

1996

Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches, The

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99 W. Va. L. Rev. 769 (1996-1997)

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THE CURRENT ASSAULT ON CONSTITUTIONAL RIGHTS AND CIVIL LIBERTIES: ORIGINS AND APPROACHES

Edward G. Donley Memorial Lecture
*Nadine Strossen**

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I. THE CURRENT BIPARTISAN ASSAULT ON CIVIL LIBERTIES

The United States is now in the throes of what many observers believe to be the most hostile climate toward civil liberties since the McCarthy era of the 1950's.¹ Under assault are the whole spectrum of rights, and the attackers include politicians across the ideological spectrum and from every unit and branch of

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¹ See Anthony Lewis, *Back to McCarthy*, N.Y. TIMES, Feb. 24, 1995, at A29.

government, from local school boards to the United States Congress and Supreme Court.

The Republican majority in the House of Representatives rushed through its so-called "Contract With America" during the early months of 1995.² And Republican Congressional leaders have rallied behind the Christian Coalition's so-called "Contract With the American Family" announced last year.³ But almost no one in government is standing up for what I regard as the original contract with America⁴ -- namely, our Constitution and Bill of Rights, with their guarantees of individual liberty.

Congress, state legislatures, and other governmental bodies are enacting laws that squarely violate that original contract, and Congress is seriously considering several proposals to amend it outright.⁵ As Congresswoman Pat Schroeder recently quipped, in light of the large number of constitutional amendments that her House colleagues had approved, they have been treating the Constitution like "a rough draft."⁶ From left to right, politicians all across the political spectrum have been undermining our basic freedoms. Throughout our seventy-six year history, the American Civil Liberties Union (ACLU) has always been a non-partisan organization.⁷ We recognize that civil liberties violations cross party lines. And the current era, sadly, makes that very clear.

On so many important civil liberties issues, there is dismayingly little support among elected officials, regardless of whether they are Democrats or Republicans. Constitutional freedoms are facing assaults from every branch and level of government all over the country, from local school boards to the United

² See Stephen Cvangros, *Contract Countdown*, CHI. TRIB., Apr. 11, 1995, at 3.

³ See Lawrence M. O'Rourke, *Religious Groups Promote Causes*, SACRAMENTO BEE, May 18, 1995, at A1. See also Thomas W. Waldron, *Christian Coalition Unveils Social 'Contract with the American Family'*, BALTIMORE SUN, May 18, 1995, at 13A.

⁴ See *Senator Byrd Calls Balanced Budget Amendment a Hoax* (NPR Morning Edition, radio broadcast, Feb. 3, 1995) (Exact language is "Here it is--the Constitution of the United States. That's my contract.").

⁵ See Katharine Q. Seelye, *Amendment on Prayers is Introduced*, N. Y. TIMES, Nov. 17, 1996, at A4. See also *The Flag-Wavers Return*, N.Y. TIMES, Dec. 7, 1995, at A1.

⁶ See Adam Clymer, *Amendment to Protect Flag Wins House Panel's Approval*, N.Y. Times, June 8, 1995, at B5.

⁷ See generally SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990).

States Supreme Court, and on every issue, from A to Z, or abortion⁸ to zoning⁹ (to cite just two examples). Likewise, on issue after issue, there is no difference between the two major presidential contenders or among most members of Congress.

Let me cite just a few recent examples:

Both Bill Clinton and Bob Dole championed the so-called "Antiterrorism" law that was enacted in April 1996.¹⁰ I say "so-called" since this law does nothing constructive to fight terrorism. Consider the two major suspected terrorist incidents since then, the TWA explosion¹¹ and the Atlanta bombing.¹² But the law was effective in fighting civil liberties. It did gut the time-honored writ of habeas corpus, and it did severely cut back on the rights of immigrants, political activists, and many other people not even suspected of being terrorists.¹³

Both Presidential candidates also supported the welfare "reform" bill enacted during the summer of 1996,¹⁴ which violates a whole range of civil liberties. Undermined are not only the equality and due process rights of children, immigrants, people with disabilities and poor people -- the law's most obvious

⁸ For an overview of some of the many recent attacks on women's fundamental right to choose an abortion, see Nadine Strossen, *Women's Rights Under Siege*, 73 N.D. L. REV. 298 (1997). See also *States' Wrongs on Abortion*, N.Y. TIMES, Sept. 3, 1996, at A1.

⁹ One example of the use of zoning laws to undermine civil liberties is the City of New York's recent law that essentially zones any sexually oriented stores out of the heart of the city, violating free speech as well as property rights. See *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D. N.Y. 1996); see also Elsa Brenner, *First Amendment Rights versus Zoning Laws for Topless Bars*, N.Y. TIMES, Apr. 16, 1995, at WC1 (Westchester Ed.). See also Jonathan P. Hicks, *Giuliani in Accord with City Council on X-rated Shops*, N.Y. TIMES, Mar. 14, 1995, at A6.

¹⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹¹ See James Barron, *Accidental Witnesses to Airborne Tragedy*, N.Y. TIMES, July 18, 1996, at A3.

¹² See William Booth & Thomas Heath, *Deadly Blast Rocks Atlanta Plaza*, WASH. POST, July 27, 1996, at A1.

¹³ See David Cole, *Courting Capital Punishment: With Little Public Opposition, the Machinery of Death is Shifting into Overdrive*, THE NATION, Feb. 26, 1996, at 20; see also Anthony Lewis, *How Terrorism Wins*, N.Y. TIMES, Mar. 11, 1996, at A1; see also Susan N. Herman, *Clinton Takes Liberties with the Constitution*, NEWSDAY, Aug. 4, 1996, at A46 (arguing that under the new law "[s]uspected terrorists could be deported without ever being told what evidence the government had that they were terrorists; the government could deport people who belonged to organizations labeled terrorist organizations, even if the organization also had many legitimate activities").

¹⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

targets. It also assails many other rights, thus adversely affecting essentially everyone in this country; these rights include reproductive freedom, separation of church and state, rights of people convicted of crime, free speech, and privacy.¹⁵

Both Bill Clinton and Bob Dole support the so-called "Defense of Marriage Act,"¹⁶ which defines marriage as "a legal union between one man and one woman as husband and wife." It thus violates not only the rights of individual lesbians and gay men,¹⁷ but also "states' rights." This is the first time in our history that Congress has interfered in an area where any regulation is quintessentially a matter of state, not federal, concern -- namely, family law and domestic relations.¹⁸

Another prime example of the current bipartisan onslaught against civil liberties is the Communications Decency Act or "CDA," which makes it a serious federal crime to communicate in cyberspace any "indecent" or "patently offensive" expression.¹⁹ Since such expression is constitutionally protected in other

¹⁵ See *Unconstitutional Welfare Bill Preys on Our Nation's Children; Measure Also Erodes Free Speech, Violates Separation of Church, State and Damages Privacy Rights* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n072696c.html>>. See also Randy Frame, *Religious Nonprofits Fight for Government Funds*, CHRISTIANITY TODAY, Dec. 11, 1995, at 65 (stating that "Barry Lynn, executive director of Americans United, maintains that federal money 'will inevitably be used to proselytize'"). See also Arthur Jones, *Foes Join to Fight Welfare Cuts*, NAT'L CATH. REP., Feb. 10, 1995, at 5 (describing how both pro-life groups and pro-choice groups are working together against provisions in the Welfare Reform Bill which would increase the number of abortions).

¹⁶ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹⁷ This creates two classes of marriage: one recognized by the federal government and the other excluded from all "federal recognition, programs, benefits, protections, and consideration." See generally Memo from Lambda Legal Defense and Education Fund, May 21, 1996, at 2 (on file with *Law Review*).

¹⁸ See generally *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (observing that "regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states"); Stephen Green, *Feinstein May Vote Against Ban on Same-Sex Marriages*, SAN DIEGO UNION-TRIB., Sept. 7, 1996, at A12 (noting Feinstein's concern that "the bill would bring unnecessary federal intrusion into the traditional prerogatives of the states to regulate marriages"); see also A More Perfect Union--Federalism in American Marriage Law: Hearings on S. 1740 Before the Senate Judiciary Comm., 105th Cong. (1996) (arguing that "[s]ince 1789 the broad authority of the states to regulate family relations, and the concomitant absence of virtually any authority of the federal government to directly regulate family relations, has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law.").

¹⁹ Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 56 (1996).

communications media,²⁰ this measure imposes particularly heavy censorship on what should be our freest medium.²¹ Yet it had the blessing of not only the Clinton Administration,²² but also most members of Congress, including then-Senate Majority Leader Bob Dole; out of the entire Congress, only twenty-one members (out of 535) voted against it.²³ After a special three-judge federal court unanimously held that the CDA violates the First Amendment,²⁴ President Clinton reaffirmed his support for the law,²⁵ and his Justice Department has asked the Supreme Court to overturn the lower court's pro-free-speech ruling.²⁶

Both Clinton and Dole have supported, as the latest alleged panacea for crime by and against young people, teen curfew laws.²⁷ These laws essentially make being young and out in public a crime, even for teenagers who are at a concert with their parents' permission.

Both Clinton and Dole also support treating juvenile offenders the same as adults.²⁸

In short, those teenagers who aren't even suspected of a crime would be

²⁰ *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996); *aff'd*, 117 S. Ct. 2329 (1997).

²¹ *American Civil Liberties Union*, 929 F. Supp. 824.

²² See Ian Christopher McCaleb, *Congress Approves Landmark Telecom Bill*, UPI, February 1, 1996, at 1.

²³ See *id.*

²⁴ *American Civil Liberties Union*, 929 F. Supp. 824. Subsequently, a second three-judge federal court reached the same conclusion, also unanimously. *Shea v. Reno*, 930 F. Supp. 916 (S.D. N.Y. 1996).

²⁵ See John Schwartz, *Court Upholds Free Speech on Internet, Blocks Decency Law*, WASH. POST, June 13, 1996, at A1. See also Joshua Quittner, *Free Speech for the Net*, TIME, June 24, 1996, at 56.

²⁶ See Hiawatha Bray, *US Decides to Appeal Indecency Act Ruling*, BOSTON GLOBE, June 28, 1996, at 78.

²⁷ See Brian McGrory, *President Says Curfews Help Deter Youth Crime*, BOSTON GLOBE, May 31, 1996, at 14. See also *Curfews and Common Sense*, N.Y. TIMES, June 11, 1996, at A1.

²⁸ See *Dole Says Toughen Up on Juvenile Offenders*, THE REC. (Bergen Record Corp.), July 7, 1996, at A10; see also Chris Major, *President Targets Youth, Dole Misses*, KAN. CITY STAR, Feb. 6, 1996, at 1.

subject to virtual house arrest;²⁹ those teenagers who are suspected or convicted of a crime would be subject to the harshest jail and prison conditions. In fact, in contrast with virtually every other country in the world,³⁰ the United States already subjects people who were minors at the time of their crimes to the death penalty.³¹ Recently, Louisiana executed someone who was only seventeen at the time of the crime; thus, the United States joined the "select" group of only four other countries -- Iran, Pakistan, Saudi Arabia and Yemen -- that have executed juvenile offenders within the past eleven years.³²

And also in the area of crime, both Presidential candidates have supported tinkering with the Original Contract with America to enshrine certain protections for crime victims, even if they conflict with existing provisions in the Bill of Rights that guarantee due process and fair trials for people accused of crime.³³

This anti-liberties dishonor roll could go on and on. The scapegoating of civil liberties by our presidential candidates, as well as other actual or "wannabe" officeholders, is based not on principle, but on politics. *Washington Post* columnist Richard Cohen recently condemned the phenomenon in an appropriately blistering piece whose title says it all: "Civil Liberties: Campaign Casualty."³⁴ Maintaining that the legacy of Clinton's four years in office is that "the civil liberties of Americans were diminished,"³⁵ Cohen concludes, "When it comes to political courage, Clinton has mastered only half the concept."³⁶ In the same vein, *New York Times* columnist Maureen Dowd recently wrote that Bill Clinton "moves from the

²⁹ See Lynn Sweet, *Clinton Endorses Curfew for Teens*, CHI. SUN-TIMES, May 31, 1996, at 3. See also John Wildermuth, *Clinton Backs Youth Curfews*, S.F. CHRON., May 31, 1996, at A1. Both articles state that Clinton wants to impose a nation-wide dusk-till-dawn curfew which starts at eight p.m. on school nights, nine p.m. during the summertime on weeknights, and eleven p.m. on weekend nights.

³⁰ The United States joins the ranks of seven other countries in allowing the execution of juvenile offenders: Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, and Yemen. See generally *Juveniles and the Death Penalty: Executions Worldwide Since 1985*, AMNESTY INT'L (Aug. 30, 1995) [hereinafter *Juveniles and the Death Penalty*].

³¹ See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Wilkins v. Missouri*, 492 U.S. 361 (1989).

³² See *Juveniles and the Death Penalty*, *supra* note 30.

³³ See Ruth Marcus, *Victims' Rights Amendment Pondered*, WASH. POST, June 21, 1996, at A8. See also Scott Wallace, *Mangling the Constitution*, WASH. POST, June 28, 1996, at A21.

³⁴ See Richard Cohen, *Civil Liberties: Campaign Casualty*, WASH. POST, July 11, 1996, at A25.

³⁵ *Id.*

³⁶ *Id.*

left wing to the right wing because what he really believes in is the West Wing.”³⁷

In the spirit of non-partisanship, I hasten to add that Bob Dole’s past record and future prospects on civil liberties are equally discouraging. Think of the horrendous violations of fundamental civil liberties to which he acceded³⁸ in the current Republican Platform. For example, it repudiates a woman’s right to choose an abortion even to save her life, and even when she is the victim of rape or incest.³⁹ The Republican Platform also denies the birthright of citizenship to certain children born in this country,⁴⁰ contrary to the Fourteenth Amendment,⁴¹ one of the major

³⁷ See Maureen Dowd, *No Bridge Too Far*, N.Y. TIMES, May 23, 1996, at A1.

³⁸ Jack W. Germond & Jules Witcover, *Dole Shows Weakness In Party Leadership Over Platform Construction*, BALTIMORE SUN, Aug. 12, 1996, at 11A (noting that Dole “simply caved in”); see Adam Nagourney, *Dole, in Change of Focus, Appeals for Black Votes*, N.Y. TIMES, Aug. 24, 1996, at A3 (questioning Dole’s “change in position that has led him from supporting affirmative action to supporting efforts . . . that would eliminate it”).

³⁹ The Republican platform asserts that “[t]he unborn child has a fundamental right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make clear that the Fourteenth Amendment’s protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions. We oppose using public revenues for abortion and will not fund organizations which advocate it. We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.” 1996 Republican Platform (visited Sept. 28, 1997) <<http://rnc.org/hq/platform96/plat5.html#all>> [hereinafter “1996 Republican Platform”]; see also David E. Rosenbaum, *Platform Ban on Abortion Veers to Right of Dole’s Stand*, N.Y. TIMES, Aug. 12, 1996, at B3; William Claiborne, *Dole Camp Retreats on Abortion*, WASH. POST, Aug. 6, 1996, at A1.

⁴⁰ The GOP also asserts that “[i]llegal aliens should not receive public benefits other than emergency aid, and those who become parents while illegally in the United States should not be qualified to claim benefits for their offspring. Legal immigrants should depend for assistance on their sponsors, who are legally responsible for their financial well-being, not the American taxpayers. Just as we require “deadbeat dads” to provide for the children they bring into the world, we should require “deadbeat sponsors” to provide for the immigrants they bring into the country. We support a constitutional amendment or constitutionally-valid legislation declaring that children born in the United States of parents who are not legally present in the United States or who are not long-term residents are not automatically citizens.” 1996 Republican Platform, *supra* note 39; see also Jodi Enda, *Dole Warms Up to Black Electorate*, TIMES-PICAYUNE (NEW ORLEANS), Aug. 24, 1996, at A10 (quoting Dole as saying, “I would not support that part of the platform,” answering the question of whether the plank denies “citizenship to children born in the United States to illegal immigrants”).

⁴¹ The Amendment reads, in pertinent part: “All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV § 1.

legacies of the Union victory in the Civil War.⁴²

And the Republican Platform also favored two additional constitutional amendments that would destroy the twin pillars of our cherished First Amendment freedoms: political and religious liberty. One such amendment would destroy political liberty by allowing the government to imprison people for using the American flag to express dissent.⁴³ The second would destroy religious liberty by allowing the government to impose someone else's prayers on your children in the public schools.⁴⁴

Because we now face so many threats to civil liberties, and since new ones appear with each passing day, I cannot discuss all of them individually. Instead, I will discuss five general themes that unify many of these specific attacks: the politics of scapegoating, the retrenchment on racial justice, the politics of symbolism, the hypocritical hiding behind a purported concern with the welfare of children and young people, and attacks on the independence of our judiciary.

II. THE POLITICS OF SCAPEGOATING

The first major theme that characterizes all of the many current attacks on human rights is the politics of scapegoating. Many people feel frightened and insecure about crime and about the economy. In the wake of what futurists Alvin and Heidi Toffler have called the "Third Wave" or Post-Industrial Revolution,⁴⁵ many people are as economically, educationally, and socially dislocated as were

⁴² After enduring the worst war in our nation's history and during the Congressional debates about the Fourteenth Amendment, the Senate unanimously voted to add the citizenship clause to the beginning of the amendment to keep it "above the reach of political strife, [and] beyond the reach of the plots and machinations of any party." See CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

⁴³ The GOP notes that "While we benefit from our differences, we must also strengthen the ties that bind us to one another. Foremost among those is the flag. Its deliberate desecration is not "free speech," but an assault against our history and our hopes. We support a constitutional amendment that will restore to the people, through their elected representatives, their right to safeguard Old Glory. We condemn Bill Clinton's refusal, once again, to protect and preserve the most precious symbol of our Republic." See *1996 Republican Platform*, *supra* note 39.

⁴⁴ The Republican Party promises to "continue to work for the return of voluntary prayer to our schools and will strongly enforce the Republican legislation that guarantees equal access to school facilities by student religious groups. [It] encourage[s] State legislatures to pass statutes which prohibit local school boards from adopting policies of denial regarding voluntary school prayer." *Id.*

⁴⁵ See Jim Impoco, *Speaker Gingrich's Intellectual Gurus*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 75; see also Barbara Ehrenreich, *Surfing the Third Wave*, N.Y. TIMES, May 7, 1995, at A1.

their ancestors during the "Second Wave" or Industrial Revolution.⁴⁶ Accordingly, what we used to call the "middle class" is now being called the "anxious class."⁴⁷

Likewise, although crime rates in the United States have been declining or leveling off in the recent past,⁴⁸ surveys continue to show that people are very frightened about crime.⁴⁹ Such fear is heightened by highly publicized crimes such as the Oklahoma City bombing in 1995 and the Atlanta bomb in 1996.⁵⁰

People are understandably anxious to find solutions to our nation's pressing economic, safety, and other problems.

Politicians are eager to stir up and pander to these popular fears and to offer a "quick fix" solution to them. Unfortunately, throughout American history, scapegoating rights has always been the cheapest quick fix in the book; no taxes have to be raised. As Supreme Court Justice Sandra Day O'Connor warned in a dissenting opinion last year, "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."⁵¹

Now, as always throughout American history, during our recurring periods of social anxiety, particularly targeted are the rights of individuals and groups who are already the least powerful and least popular in our society: immigrants,

⁴⁶ See Frank Swoboda, *Robert Reich: The Return of a Policymaker*, WASH. POST, May 7, 1995, at H1.

⁴⁷ *Id.*

⁴⁸ Richard Lacayo, *Law and Order*, TIME, Jan. 15, 1996, at 48 ("[a]fter years of depressing and implacable upswing, serious crime is retreating all around the U.S. In the nine cities with a population of more than 1 million, the decrease in violent crimes was eight percent in 1994. Nationally, murders fell twelve percent in the first six months of 1995, and serious crimes of all kinds dropped one percent to two percent. The suburbs, long a growth area for felonies, posted declines between four percent and five percent last year in violent crime.").

⁴⁹ Brenda W. Rotzoll, *Opinions Shifting Based On Fear*, CHI. SUN-TIMES, Oct. 8, 1996, at 2 (quoting Robert Sampson, professor of sociology as saying, "The recent reports of drops in crime rates haven't changed peoples' apprehensions. They still remain at very high levels, especially when compared to other modern industrialized countries."); see also Michael Shanahan, *U.S. Crime Rates of All Types Down*, TIMES-PICAYUNE (NEW ORLEANS), July 7, 1996, at A14.

⁵⁰ See Paul Moses, *Poll Shows Bombing Has City Nervous*, NEWSDAY, May 4, 1995, at A7. See also Andrea Stone & Tom Squitieri, *Bomb Forces Question: How Safe Are We?*, USA TODAY, Apr. 21, 1995, at A1. See generally Mindy Fetterman, *Search. Pat Down. Question. Our Mood is One of Suspicion*, USA TODAY, July 29, 1996, at 4A.

⁵¹ *Vernonia School District v. Acton*, 115 S. Ct. 2386, 2406 (1995) (O'Connor, J., dissenting). As the late Justice Thurgood Marshall observed, "[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989); see *ACLU To Clinton: Veto Terrorism Bill, Preserve Our Greatest Liberty* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n041896b.html>>.

including even long-term legal immigrants;⁵² the children of immigrants, including native-born children;⁵³ homeless people;⁵⁴ poor people, especially poor women and

⁵² See Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1; Anthony Lewis, *Why The Cruelty?*, N.Y. TIMES, Sept. 23, 1996, at A1 ("[o]ne provision -- among too many even to list -- would make retroactive the welfare bill's restrictions on the use of various public programs by legal immigrants. The restrictions would now apply to people lawfully admitted during the last five years. For example, a woman who came to the United States legally three years ago, who is pregnant and has been abandoned by her husband, leaving her desperate, could be barred from prenatal care and Medicaid.").

⁵³ See Marilyn Geewax, *Immigration*, S.D. UNION-TRIB., Aug. 22, 1993, at G4. See also Clay Robison, *Punishing Young Won't Stop the Illegals*, HOUSTON CHRON., July 14, 1996, at 2.

⁵⁴ Twenty-five states have statutes pertaining to begging. Thirteen of these statutes do not prohibit solicitation, but grant power to various state authorities to regulate and punish it: Ark. Stat. Ann. § 14-54-1408 (Michie 1994) (City Council authorized to punish begging); Ill. Ann. Stat. ch. 24 para. 11-5-4 (Smith-Hurd 1993) (Corporate authority of each municipality); Mont. Code Ann. § 7-32-4304 (1995) (City and town council); Neb. Rev. Stat. § 14-102 (1991) (Cities of Metropolitan class); N.H. Rev. Stat. Ann. § 47:17 (1991 & Supp. 1996) (City council); N.C. Gen. Stat. § 160A-179 (1996)(City); N.D. Cent. Code § 40-05-01 (1983 & Supp. 1996) (Municipalities); Ohio Rev. Code Ann. § 715.55 (Anderson 1991 & 1995) (repealed 1996) (Municipal corporations); Utah Code Ann. § 10-8-51 (1996) (City); Wash. Rev. Code Ann. § 35.22.280 (1990 & Supp. 1997) (First class cities); W.Va. Code § 8-21-10 (1990) (Board of Parks and Recreation Commission); Wyoming Stat. § 15-1-103 (1996) (Governing bodies of all cities and towns given authority to restrain and punish "vagrancy, mendicants and prostitutes"); N.J. Stat. Ann. § 40:48-1(7) (West 1991) (Governing body of every municipality). Two statutes adopt the old common law rule and prohibit solicitation only by those able to work: La. Rev. Stat. § 14:107 (West 1986) (prohibits vagrancy, which is defined as begging or solicitation of alms by able bodied persons, though not begging or soliciting for "bona fide" religious and charitable organizations); Miss. Code Ann. § 97-35-37 (1994) (punishes vagrants, defined as able-bodied persons who beg for a livelihood). The other states prohibit solicitation or forms thereof: Kan. Stat. Ann. § 21-4108 (1996) (repealed) (prohibits vagrancy, which is defined as deriving "support in whole or in part from begging"); Minn. Stat. Ann. §609.725 (West 1987) (same); Wis. Stat. Ann. § 947.02(4) (West 1996) (same); Vt. Stat. Ann. tit. 13, § 3901 (1974) (vagrancy defined as transient person living without visible means of support who begs); Mass. Ann. Laws ch. 272, §§ 63 & 64 (Law. Co-op. 1992) (punishes tramps, which are described as persons begging or soliciting alms and having no residence in town within which act is committed); Mich. Comp. Laws § 750.167(1)(h) (Mich. Stat. Ann. §28.364 (Callaghan 1990)) (punishes disorderly person which is defined as any person found begging in public place). See also N.J. Stat. Ann. §32:1-146.6 (West 1990) (codifying Port Authority rule which prohibits any person "unless duly authorized by the Port Authority, . . . (from) solicit[ing] alms"). See also *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) (holding that "[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment -- sleeping, eating, and other innocent conduct"). See Sara Rimer, *Doors Closing as Mood on the Homeless Sours*, N.Y. TIMES, Nov. 18, 1989, § 1, at 1. See also Isabel Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns Into Frustration*, N.Y. TIMES, Sept. 2, 1991, at A11. See also Peter Fimrite, *Berkeley's Begging Law Tested*, S.F. CHRON., Feb. 28, 1995, at A14. See Tracy A. Bateman, J.D., Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R. 5th 455 (1992).

their children;⁵⁵ children and young people in general;⁵⁶ people accused of crime;⁵⁷ and people convicted of crime.⁵⁸

III. THE RETRENCHMENT ON RACIAL JUSTICE

These groups of people who are now facing stepped-up assaults on their civil liberties have something else in common: most of them are disproportionately non-white.⁵⁹ This distressing fact points to a second major theme that cuts across

⁵⁵ See Mary McGrory, *Voting with Conscience, and Feet*, WASH. POST, Sept. 17, 1996, at A2. See William M. Welch, *Welfare Bill Rouses Liberal Clinton Allies But They're Still Supporting Him*, USA TODAY, Aug. 22, 1996, at 4A. See also *Acts of Principle*, N.Y. TIMES, Sept. 13, 1996, at A1.

⁵⁶ See Daniel T. Wackerman, *God Forbid That Anything Remotely Lewd or Gratuitously Violent Should Appear on the Old Zenith*, AMERICA, Mar. 2, 1996, at 8 (discussing the V-chip which censors violent and sexual programming from television). See Philip Gailey, *Entertaining a Big Debate*, ST. PETERSBURG TIMES, June 11, 1995, at 2D (discussing Dole's attack on the entertainment industry for distributing gangsta rap and violent movies). See Chris Major, *President Targets Youth, Dole Misses*, KAN. CITY STAR, Feb. 6, 1996, at 1 (advocating mandatory school uniforms). See David Daley, *Lieberman Steps Up Campaign Against 'Vicious, Violent' Music Lyrics*, STATES NEWS SERVICE, May 30, 1996 (crusading against distribution of violent and vulgar music lyrics). See also Lynn Sweet, *Clinton Endorses Curfew for Teens*, CHIC. SUN-TIMES, May 31, 1996, at 3.

⁵⁷ See *Mugging the Constitution: Exclusionary Rule Change Would Gut Americans' Protection Against Abuses of Power* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n021795.html>>. See also *Mugging the Constitution, Part II Senate Proposal on Exclusionary Rule Even More Radical* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n030695a.html>>.

⁵⁸ Susan Estrich, *Three strikes: Judges' discretion advised*, USA TODAY, June 27, 1996, at 13A (noting that 24 states have "three strike" laws). See *Habeas in Peril: Times Calls on Clinton to Veto* (visited Sept. 27, 1997) <<http://www.aclu.org/news/8aprarc.html#2>>.

⁵⁹ Whites, not of Hispanic origin, make up 8.5% of those living in poverty, while blacks make up 29.3%, Hispanics make up 30.3%, Asian and Pacific Islanders make up 14.6%. U.S. Census Bureau, *Poverty 1995, Table A. Persons and Families in Poverty by Selected Characteristics: 1994 and 1995* (visited Sept. 27, 1997) <<http://www.census.gov/hhes/poverty/pov95/povest1.html>>. In 1993, households with white householders had a median measured net worth of \$45,740, households with black householders had a median measured net worth of \$4,418, and households with Hispanic-origin householders had a median measured net worth of \$4,656, which was not significantly different from that of black households. U.S. Census Bureau, *Asset Ownership of Households: 1993 Highlights* (visited Sept. 27, 1997) <<http://www.census.gov/ftp/pub/hhes/wealth/highlite.html>>. Twenty-seven percent of white males and 21% of white females have finished four years of college or more, while only 13.6% of black males, 12.9% of black females, 10.1% of Hispanic males, and 8.4% of Hispanic females have received equivalent educations. <<http://www.census.gov/population/socdemo/education/table18.dat>>. See also Michael L. Principe, *Political Correctness in the 1990's and Beyond*, 23 N. KY. L. REV. 515 (1996) (arguing that "even though the creation of the U.S. Sentencing Commission was to insure equality in federal criminal sentencing, blacks still receive on average 10% longer sentences

many of the current cutbacks on rights: the diminished national commitment to racial justice.

The most dramatic illustration of this sad phenomenon is the broad-scale attack on affirmative action programs, which are designed to counter past and ongoing discrimination on the basis of race and gender.⁶⁰ Politicians who until recently supported affirmative action, including Bob Dole, have reversed themselves.⁶¹

They are apparently pandering to polls suggesting that many "angry white men" are eager to blame their economic woes on affirmative action programs, and the women and members of racial minorities who have been given educational and employment opportunities thanks to these programs.⁶² In an Orwellian twist, opponents of affirmative measures to secure equal opportunity for the women and racial minorities who have long faced official and private discrimination in this country have entitled a pending California voter initiative to repeal all such measures, "The California Civil Rights Initiative."⁶³

Opponents of affirmative action assert that the primary victims of discrimination today are white men.⁶⁴ Yet this contention flies in the face of

than whites for similar crimes. In fact, in some federal districts, the average discrepancy can be up to 40%") (footnotes omitted).

⁶⁰ See Tony Snow, *Here's What Republicans Stand For*, USA TODAY, Aug. 12, 1996, at 16A (stating that the Republican plank on affirmative action includes support for the California Civil Rights Initiative as well as the Dole-Canady Bill). See also Rich Lowry, *Quitting Quotas*, NAT'L REV., Mar. 20, 1995, at 26 (explaining the process for the Republican Party to end affirmative action on both the state and federal levels).

⁶¹ See Louis Harris, *Affirmative Action and the Voter*, N.Y. TIMES, July 31, 1995, at A2. See also Carla Seaquist, *Pete Wilson's Gorgeous Mosaic*, N.Y. TIMES, Aug. 15, 1995, at A2.

⁶² See Patricia Edmonds and Richard Benedetto, *Angry White Men*, USA TODAY, Nov. 11, 1994, at 1A.

⁶³ Proposition 209 Cal. Ballot Measure No. 6, 1995-96 Regular Session (amending CAL. CONST. art. I, § 31). Since this piece was written, Proposition 209 was passed and upheld by the Ninth Circuit Court of Appeals. A petition for writ of certiorari is pending before the United States Supreme Court. See Raphael J. Sonenshein, *Pride and Prejudice as Republicans Back Away From Prop. 209*, L.A. DAILY NEWS, Sept. 29, 1996, at V1. See also *Activists Make Vow to Defeat Prop.*, PRESS-ENTERPRISE (Riverdale Cal.), Sept. 8, 1996, at A4.

⁶⁴ Brian McGrory & Ann Scales, *Police Preferences*, BOSTON GLOBE, May 25, 1995, at 1 (quoting Boston Mayor James Kelly: "The city is full of white men who were victims of discrimination. There were whites who scored 100 on the tests, but they are not Boston police officers for one reason: the color of their skin. What we have now is a quota system."); see FREDERICK R. LYNCH, *INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION* (1992) (arguing that white men are

numerous recent studies documenting ongoing discrimination against women and members of racial minorities in employment, education, and other important spheres.⁶⁵ For example, in 1995, a bipartisan government commission, the "Glass Ceiling Commission," released its report documenting the dramatic underrepresentation of women and racial minorities in upper management positions.⁶⁶ It showed that while women constitute 45.7% of the work force, white men occupy 97% of these positions.⁶⁷ And the report demonstrates that the reason for these glaring disparities is not because white men are so vastly more qualified, but rather because of ongoing biases and stereotypes about women and racial minorities, as well as their lack of access to mentoring relationships.⁶⁸

The Glass Ceiling Commission was created in 1991 on the initiative of none other than Bob Dole himself, who was then an ardent supporter of affirmative action.⁶⁹ Shortly after his Commission documented the ongoing necessity for affirmative measures to combat the ongoing discrimination suffered by women and racial minorities, though, Dole introduced legislation that would eradicate federal affirmative action programs.⁷⁰

Even the United States Supreme Court, which since the 1950s has provided moral leadership for our country on issues of racial justice, has now abandoned that important role. In a series of hard-fought, 5-4 decisions in its last two terms, a majority imposed new barriers to remedial measures in the areas of school

the main victims of affirmative action programs).

⁶⁵ See H. Cross, et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers*, 42 URBAN INSTITUTE REPORT 90-94, 1990); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); see also A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50 (G. Jaynes and R. Williams eds., 1989); Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420 (1988).

⁶⁶ FEDERAL GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995).

⁶⁷ *Id.* at 12.

⁶⁸ *Id.* at 5.

⁶⁹ See Peter T. Kilborn, *For Many in Work Force, 'Glass Ceiling' Still Exists*, N.Y. TIMES, Mar. 16, 1995, at A1.

⁷⁰ See ACLU Calls On President Clinton To Show Continued Leadership on Affirmative Action (visited Sept. 27, 1997) <<http://www.aclu.org/news/n031296b.html>>.

desegregation,⁷¹ voting,⁷² and government contracting.⁷³ Espousing a “color-blind” approach to the Constitution, the majority is, instead, blind to the injustice that follows from such an ostensibly neutral stance in a society where racial bigotry and ignorance are still, alas, rampant.⁷⁴

Much as the Supreme Court has cut back on affirmative action, last spring the Fifth Circuit Court of Appeals cut back even further. In *Hopwood v. State of Texas*, the Fifth Circuit declared that the Supreme Court’s landmark decision upholding affirmative action in higher education, *Bakke*, was no longer good law.⁷⁵ Although the high court itself has never revisited *Bakke*, the Fifth Circuit concluded that it had been implicitly overruled by Supreme Court decisions concerning affirmative action programs outside the higher education context.⁷⁶

In June, the Supreme Court decided not to review the *Hopwood* case.⁷⁷ Therefore, the Fifth Circuit’s ruling is now the final authority in Texas, Louisiana, and Mississippi. These states have a long and shameful history of race and gender discrimination.⁷⁸ Yet their colleges and universities are now barred from any affirmative steps to counter that historic legacy.

Many experts have also linked a flagging commitment to racial justice with the growing injustice of the misnamed criminal “justice” system. There is no doubt

⁷¹ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

⁷² *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

⁷³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷⁴ David B. Oppenheimer demonstrates that while 97% of white Americans believe that blacks “should have as good a chance as white people to get any kind of job,” majorities of these same people believe that blacks are less intelligent (53%) and lazier (62%) than whites. David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 904-909 (1993).

⁷⁵ *Hopwood v. Texas*, 78 F.3d 932, 942-48 (5th Cir. 1996), *cert denied*, 116 S. Ct. 2581 (1996).

⁷⁶ *Id.*

⁷⁷ *Hopwood*, 116 S.Ct. 2581. Justice Ginsburg, with whom Justice Souter joins, states that “whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance.” *Id.* Here, however, the petitioners are challenging the rationale used by the Court of Appeals, not the judgment that the admissions process used by the University of Texas Law School in 1992 was unconstitutional. Justice Ginsberg concluded that “this Court reviews judgments, not opinions,” and therefore must await a “final judgment on a program genuinely in controversy before addressing the important question raised in this petition.” *Id.*

⁷⁸ See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

that this system, at every stage, has a disproportionate adverse impact on members of racial minorities.⁷⁹ At best, this is the result of reckless indifference. At worst, it is the product of intentional design. One recent example is the refusal by Congress and the Clinton Administration to rectify the blatant racial disparity in our cocaine sentencing laws.⁸⁰ These laws impose dramatically harsher penalties on the possession of crack cocaine, which is used mostly by African-Americans, than on the possession of chemically identical powder cocaine, which is used mostly by Caucasians.⁸¹ Some lower courts have found this disparity to be unconstitutional. The Minnesota Supreme Court held that it violated that state's constitutional equality guarantee.⁸² Moreover, a federal district court held that it violated the Eighth Amendment's prohibition on cruel and unusual punishments.⁸³ But the United States Supreme Court has a relatively narrow view of both of these constitutional rights.⁸⁴ I therefore doubt that it would hold them violated by this

⁷⁹ See R. William Ide III, *End Racial Discrimination in the Death Penalty*, USA TODAY, May 12, 1994, at 10A. See also Nancy Mathis, *Statistical Proof of Racial Bias in Death Sentences?*, HOUSTON CHRON., July 20, 1994, at A5.

⁸⁰ See Naftali Bendavid, *Department Lashes Out at 'Soft' Drug Sentences*, THE RECORDER, June 15, 1995, at 1.

⁸¹ See *id.* First offenses where greater than five kilograms of powder cocaine or fifty grams of crack carry a minimum ten year sentence; subsequent violations demand at least a twenty year prison sentence. 21 U.S.C. § 841 (b)(1)(A)(ii)-(iii) (1982 & Supp. V 1987). Similarly, offenses involving 500 grams of powder cocaine or five grams of crack mandate a five year sentence for the first time and ten years for subsequent convictions. 21 U.S.C. § 841 (b)(1)(B)(ii)-(iii) (1982 & Supp. V 1987).

⁸² *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).

⁸³ *United States v. Clay*, 846 F. Supp. 768 (E.D. Mo. 1994).

⁸⁴ Regarding the Equal Protection Clause, the United States Supreme Court has ruled that it bars only measures that are intentionally designed to have a disparate adverse impact on the basis of race (or some other impermissible criterion for government action). *Washington v. Davis*, 426 U.S. 229 (1976). In contrast, the Minnesota Supreme Court has construed the counterpart provision of its state Constitution as also barring any measures that have such a disparate adverse effect, even if that effect was unintentional. Regarding the Eighth Amendment's prohibition on "cruel and unusual punishments," the United States Supreme Court has had a history: The court, in *Rummel v. Estelle*, 445 U.S. 263 (1980), held that it did not constitute "cruel and unusual punishment" to impose a life sentence, under a recidivist statute, upon a defendant who had been convicted of fraudulent use of a credit card to obtain goods valued at eighty dollars, passing a forged check in the amount of \$28.36, and obtaining \$120.75 by false pretenses. Similarly, two years later, in *Hutto v. Davis*, 454 U.S. 370 (1982), the court rejected an Eighth Amendment challenge to a forty year prison term and a \$20,000 fine for possession and distribution of only nine ounces of marijuana. Almost eighteen months later, the court, in *Solem v. Helm*, 463 U.S. 277 (1983), set aside under the Eighth Amendment, because it was disproportionate, a sentence of life imprisonment without possibility of parole, imposed under a

type of racial disparity in our criminal policies, regardless of how devastating their impacts are, and regardless of how conscious policymakers are of those impacts.

IV. THE POLITICS OF SYMBOLISM

A third major theme that cuts across many recent threats to civil liberties is what I call "the politics of symbolism." Rather than pursuing constructive measures to deal with society's problems, too many politicians advocate purely symbolic measures.

The quintessential symbolic measure is censorship; by definition, it focuses on symbols -- namely, words or images. And recently, the United States has been awash in proposed measures to censor a wide range of controversial expression in all our media.

Highly publicized attacks on the media and popular culture have been made by politicians and citizens across the political spectrum: from Bob Dole⁸⁵ to Bill Clinton,⁸⁶ who have both given major speeches attacking what they view as excessive violence on television and in films; and from William Bennett to C. Delores Tucker, who have jointly attacked rap and rock lyrics for what they consider inappropriate misogyny and violence.⁸⁷

South Dakota recidivist statute for successive offenses of petty thefts and burglaries. However, the court returned to its "cruel and unusual" jurisprudence with its decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), holding that the Eighth Amendment contains no proportionality guarantee; it affirmed the petitioner's mandatory life-term conviction for possession of 650 grams of cocaine.

⁸⁵ See generally Maria L. La Ganga, *Dole on Research Mission to the Movies Politics: Republican Takes In 'Independence Day' To Prepare For Speech*, L.A. TIMES, July 30, 1996, at A1 (quoting Dole as "criticizing Hollywood for 'bombarding our children with destructive messages of casual violence and more casual sex. . . . Our music, movies, television and advertising regularly push the limits of decency.'"). See also Kevi, Caldabaugh, *Much of the Violence on Television is Provided by Sports*, GREENSBORO NEWS & REC., Mar. 3, 1996, at F3.

⁸⁶ See generally *id.* "And President Bill Clinton, in his State of the Union address, advocated the 'V-chip,' a device that would allow parents to block out violent and sex-oriented television programs to protect their innocent children." *Id.* See also John Broder, *Clinton Vows to Urge More Children's Educational TV Campaign*, L.A. TIMES, June 12, 1996, at A1. After Clinton attended a Monday night "Beverly Hills fund-raiser with scores of top Hollywood executives and talent," his Tuesday speech "praise[d] the industry for its efforts to clean up program content." *Id.* See also Ann Devroy, *Clinton Pitches Hollywood "Partnership"*, WASH. POST, Dec. 5, 1993, at A6.

⁸⁷ William Raspberry, *Passing the Rap*, WASH. POST, Aug. 14, 1995, at A17; *Bennett Lashes Out at Lyrics*, ROCKY MOUNTAIN NEWS, May 31, 1996, at 58A. "Former Education Secretary William J. Bennett launched 'Round 2' of his campaign against what he calls offensive lyrics in rap music Thursday with a series of radio ads targeting five major entertainment companies. . . . By last fall, Time Warner had sold its 50% stake . . . succumbing to pressure from Bennett and Senate Majority

Only twenty-one members of Congress -- out of the total of 535 -- voted against the Communications Decency Act,⁸⁸ which imposes a censorial straitjacket on cyberspace. And that Act was part of a broader telecommunications bill,⁸⁹ which also contains other censorial measures. Most importantly, the "V-Chip" provision⁹⁰ will severely restrict the televising of not only material that is "violent," but also material that is "objectionable" or "indecent," even if it has serious literary, artistic, political, or scientific value.⁹¹

In 1995, the United States Court of Appeals for the D.C. Circuit issued two decisions that upheld laws imposing sweeping censorship on broadcast⁹² and cable television.⁹³ The Supreme Court did not review the broadcast decision,⁹⁴ and it

Leader Bob Dole, R-Kan., who joined the attack." *Id.* See also Kate Rankine, *City: Time Warner Agrees To Sell "Rap" Label*, DAILY TELEGRAPH (LONDON), Sept. 29, 1995, at 27; *Watchdogs Protest "Obscene" Lyrics*, UPI, May 30, 1996. "A watchdog group . . . announced a campaign against five major record companies. . . . Former Secretary of Education William Bennett . . . and C. Delores Tucker, chairwoman of the National Political Congress of Black Women, urged corporations to stop putting out offensive music and announced a radio campaign to alert parents to the problem." *Id.*

⁸⁸ See the Communications Decency Act, enacted as part of the Telecommunications Act of 1996, Tit. V, 501-512, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. 223 (a)-(h)).

⁸⁹ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.).

⁹⁰ See Telecommunications Act of 1996, Pub. L. No. 104-104, 551, 110 Stat. 56, 139 (1996) (V-chip section, "Parental choice in television programming").

⁹¹ See generally *Violence Chip: Why Does the ACLU Oppose the V-Chip Legislation Currently Pending in Congress?*, (visited Sept. 27, 1997) <http://www.aclu.org/library/aavchip.html> (Resources: February 29, 1996 - *ACLU Expresses Concerns on TV Rating Scheme; Says "Voluntary" System is Government-Backed Censorship*; Briefing Paper #14: "Artistic Freedom.").

⁹² See *Action for Children's Television v. FCC* (ACT III), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S.Ct. 701 (1996) (upholding "safe harbor rules" to protect children from indecent broadcasts). See prior history: *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993) *reh'g en banc, granted, vacated*; *Action for Children's Television v. FCC*, 15 F.3d 186 (D.C. Cir. 1994) and *remanded, on reh'g, en banc*; negative reference to: *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991). See also *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied sub nom.* *Children's Legal Found. v. Action for Children's Television*, 503 U.S. 913 (1992).

⁹³ See *Alliance for Community Media v. FCC*, 56 F.3d 105, 145-49 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting), *aff'd in part and rev'd in part sub nom.*, *Denver Area Telecommunications Consortium v. FCC*, 116 S.Ct. 2374 (1996).

The dissenting opinion of J. Edwards in *Alliance v. FCC*, strongly criticizes the majority's decision as damaging and incorrect. "Contrary to Judge Wald's dissent, I do believe that a

affirmed a portion of the cable ruling.⁹⁵

All of these censorship measures, as well as any other measures infected by the politics of symbolism, are doubly flawed: they are as ineffective as they are unprincipled. Not only do they fail to address the actual societal problems at issue, but even worse, they are diversionary. Politicians can take credit for "doing something" when they are in fact doing nothing -- indeed, worse than nothing, because they *are* violating our civil liberties.

For example, in contrast with all the officials who support laws to take guns off television screens and out of song lyrics, there are far fewer who support laws to take guns off our streets.⁹⁶

The doubly flawed nature of the diversionary, symbolic, and scapegoating measures that abound in the United States today was prophetically captured by a statement Thomas Jefferson made more than two-hundred years ago, when corresponding about the then-proposed Bill of Rights: "[a] society that will trade a little liberty for a little order will deserve neither and will lose both."⁹⁷

This sadly prophetic statement is particularly apt for America's many recent anti-crime and anti-terrorism initiatives. To mark the first anniversary of the Oklahoma City bombing, during the spring of 1996, Congress passed by sweeping margins, and the President signed, a bill that was originally entitled the "Omnibus Counter-Terrorism Act." As the American Civil Liberties Union noted at the time,

segregate-and-block scheme would facilitate parental supervision." *Id.* at 147. "Even if section 10 were constitutional--as the majority holds that it is--one still would be tempted to ask, 'so what?'. I cannot dismiss the importance of the First Amendment rights at stake, however, so I dissent. In my view, sections 10(a) and 10(b) of the Act as presently written offend the Constitution." *Id.* at 149.

⁹⁴ See *Action for Children's Television v. FCC* (ACT III), 58 F.3d 654 (D.C. Cir. 1995), *cert. denied sub nom.*, *Pacifica Found. v. FCC*, 116 S. Ct. 701 (1996).

⁹⁵ *Denver Area Telecommunications Consortium*, 116 S.Ct. 2374.

⁹⁶ See generally Chuck Raasch, *Strange Things Happening in the "Cultural Wars,"* GANNETT NEWS SERVICE (Washington), June 11, 1995. "Dole took the war to new fronts in a speech earlier this month, when he criticized Time Warner and other entertainment companies for 'putting profits ahead of common decency.'" *Id.* "Critics say it is a silly debate, because the political system can do little about movies or books without outright censorship. Others say focusing on Hollywood is denial of real-life violence." On Larry King's talk show, Barbra Streisand said, "If [Dole is] against violence, why is he for putting more guns on the streets?" *Id.* Samuel Francis, *For the Election Message Look at Issues, Not People*, WASH. TIMES, Nov. 18, 1994, at A25. "NRA [The National Rifle Association] endorsed 276 House candidates. Voters returned 221 of them. Moreover, the O'Leary Report, analyzing several different polls of voters in several different states and regions, found that embracing the NRA helped the Republicans among women voters, still one of the GOP's weakest support categories." *Id.*

⁹⁷ *Williams v. Garrett*, 722 F. Supp. 254, 256 (W.D. Va. 1989) (quoting Thomas Jefferson).

this measure would more accurately have been called the "Ominous Counter-Constitution Act," given its extraordinary violations of many fundamental rights, including free speech, free association, due process, fair trial, and privacy.⁹⁸

Substituting "guilt by association" for actual evidence of criminal wrongdoing, this law allows citizens to be imprisoned and non-citizens (even long-term legal residents) to be summarily deported, because of their support for the lawful, humanitarian activities of groups that the Secretary of State labels "terrorist" -- even if they didn't know of the groups' allegedly terrorist activities, let alone support them.⁹⁹ Moreover, non-citizens can be deported in kangaroo-court-like proceedings, closed to them and their lawyers, based on secret evidence that they neither could see nor respond to.¹⁰⁰

This witch-hunt-style legislation, so reminiscent of the "Red Scare" in the 1920s and McCarthyism in the 1950s, is especially lamentable because, as Thomas Jefferson's quotation warned, its assaults on liberty are ineffective and unnecessary in protecting us against terrorist crimes. That the FBI and other law enforcement authorities have ample power to investigate and prosecute suspected terrorists is

⁹⁸ Open Letter from Nadine Strossen, ACLU President & Ira Glasser, ACLU Executive Director, to President Clinton, *ACLU To Clinton: Veto Terrorism Bill, Preserve Our Greatest Liberty* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n041896b.html>>.

⁹⁹ See generally David Cole, *Terrorizing the Constitution: The Government's Anti-Terror Proposal Attacks Everyone's Fundamental Rights*, THE NATION, March 25, 1996, at 11; Michael Ross, *Terror in Oklahoma City; Tougher Immigration Laws Are Expected in Bomb Aftermath; Legislation: Many Measures, Including Anti-Terrorist Proposals Are Not New. But Now There Is Bipartisan Support. Civil Libertarians Express Constitutional Concerns*, L. A. TIMES, Apr. 21, 1995, at A20. "Although many Democrats and civil libertarians remain strongly opposed to some of the provisions in the Clinton Bill -- including expedited deportations and special 'anti-terrorist' courts -- the Administration's allies are now predicting swift approval." *Id.*

¹⁰⁰ See generally Cole, *supra* note 99, at 11. The anti-terrorism law would "sacrifice" the "American adversarial system--that the government must confront individuals with evidence it seeks to use against them." *Id.* "A third provision of the bill would allow the government to deport immigrants--both permanent residents and those here temporarily--on the strength of secret evidence that neither the immigrant nor his or her attorney would ever see. The government would be free to submit evidence behind closed doors to a judge handpicked by Chief Justice William Rehnquist, and to make secret arguments and take secret appeals outside the immigrant's presence." *Id.* Ross, *supra* note 99, at A20. "Under the [anti-terrorist] bill, expedited deportation hearings would be held before a special panel of federal District Court judges, who would review any classified intelligence information and would not be required to share it with the suspect or the suspect's lawyers." *Id.* The ACLU opposes such "restrictive measures" as an "unprecedented violation of due process rights" that "would eviscerate the Constitution and the Bill of Rights to an extraordinary extent." *Id.* Michele Stevens, *Anti-Terrorism Bill Is Terrifying*, CHI. SUN-TIMES, June 12, 1995, at 25. "The legislation, which passed 91-8 last Wednesday, would do little to make us safer. It would severely restrict the freedoms of U.S. citizens and resident aliens alike, however, under the guise of protection." *Id.*

shown by the Oklahoma City tragedy itself: within days, the two major suspects were identified and incarcerated.¹⁰¹ Likewise, those responsible for the World Trade Center bombing in 1993 were swiftly apprehended and prosecuted, and they are now serving life sentences.¹⁰²

The FBI Guidelines already give federal law enforcement officials ample authority to monitor and head off planned terrorist or criminal activities. These Guidelines permit infiltration, surveillance, and other investigative techniques whenever there is "a reasonable indication" that criminal or violent activity is being planned.¹⁰³ From a civil libertarian's perspective, these broad standards already vest in federal authorities too much power to violate the privacy of law-abiding citizens, and unconstitutionally water down the strict "probable cause" standard¹⁰⁴ that the

¹⁰¹ See generally Mark Shaffer, *Kingman, Suspect Likely Tied*, ARIZ. REPUBLIC, Apr. 22, 1995, at A1. Oklahoma City bombing suspect Timothy McVeigh, "who had been in custody since shortly after the bombing Wednesday morning [April 19], was arrested on bombing charges" *Id.* James Vicina, *Reno Wins Praise for Handling Of Oklahoma Blast*, REUTERS NORTH AMERICAN WIRE (Washington), Apr. 30, 1995. Immediately after the Oklahoma bombing, Reno "immediately ordered top Justice Department prosecutors and FBI investigators to the scene." *Id.* Reno "won plaudits even from critical Republicans for her response to the April 19 truck-bomb attack on the Oklahoma City federal office building" because of the "initial quick success of the Oklahoma investigation, with the apprehension of key bombing suspect Timothy McVeigh" *Id.* *Nichols Said to Get 2nd Look In Bomb Inquiry*, L. A. TIMES, May 8, 1995, at A21. "Investigators are again eyeing the possibility that Terry L. Nichols is the elusive second suspect in the Oklahoma City bombing, a magazine said." *Id.* Pierre Thomas, *Agents Turn To Sister of Bomb Suspect; Authorities Decide To Charge 2nd Man*, WASH. POST, May 10, 1995, at A01.

¹⁰² See generally Anthony M. DeStefano, *Jordanian Arranged: Feds: Suspect Drove Ryder Van Into Trade Center Lot*, NEWSDAY, Aug. 4, 1995, at A07. "Ismoil was arrested in Jordan over the weekend and then brought to the United States Wednesday night to face a 12 count indictment [for his part in the] bombing conspiracy and then fleeing the country after the blast on Feb. 26, 1993." *Id.* "Four men already have been convicted for their roles in the Trade Center blast and sentenced to up to 240 years in prison." *Id.* *Kuwait: Bomb Suspect Aided Iraq*, WASH. POST, Feb. 15, 1995, at A16. Ramzi Ahmed Yousef, "the alleged mastermind of the 1993 New York World Trade Center bombing," is presently "being held by U.S. authorities after being arrested in Pakistan last week." *Id.*

¹⁰³ See *Jacobson v. United States*, 503 U.S. 540, 549 n.2 (1992) (quoting Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), reprinted in S. Rep. No. 97-682, 551 (1982)). See *Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong. Sess. 23, 25-26 (1983) (statement of William Webster, Director, Federal Bureau of Investigation).

¹⁰⁴ Louis J. Freeh, *Freeh: FBI Has Learned From Mistakes in Probing Terrorism*, LEGAL TIMES, July 10, 1995, at 26. In a letter to the editor by FBI Director Freeh, and a reply by Columnist Monroe Freedman, Mr. Freeh claims that the columnist "mischaracterized the intentions of the FBI." *Id.* Mr. Freeh states that he "did not propose that the FBI be permitted to open 'broad undercover

Fourth Amendment specifies as a prerequisite for any "search or seizure."¹⁰⁵ Indeed, these Guidelines had been written by the Reagan Administration expressly to give the FBI more leeway in investigating domestic terrorism.¹⁰⁶ So the Clinton Administration and the bipartisan Congressional supporters of the new legislation are, in effect, accusing the Reagan Administration of having been too soft on crime and terrorism!

Sweeping far beyond the terrorist acts that allegedly justified it, the counter terrorism law essentially guts the "Great Writ" of habeas corpus, the time-honored remedy for all unjustly held prisoners,¹⁰⁷ which Alexander Hamilton hailed as "the greatest liberty of all."¹⁰⁸ By hamstringing the writ with stringent time limits, the law would make it unavailable even for Death Row inmates, even if their

investigations of dissident groups that use militant rhetoric." *Id.* Mr. Freedman "skeptically" replied by citing the FBI Director's words and intentions to "reinterpret the [FBI terrorist investigative] guidelines" as stated in Mr. Freeh's testimony before Congress. *Id.* "The head of the FBI ... told Congress today that the Justice Department was preparing to loosen the standards for investigating suspicious organizations" *Id.* *FBI Rules Reversal Could Cause Trouble*, THE ADVOCATE, May 5, 1995, at 6B. "Pressure has been building in Congress to pass legislation that would toughen our anti-terrorist laws and make it easier for the government to surveil groups suspected of having terrorist aims or links." FBI Director Freeh explained that a "reinterpretation of the existing guidelines" by the administration "would permit agents to begin broad investigations 'with respect to a domestic terrorism group if that group advocated violence or force with respect to achieving any political or social objectives.'" *Id.* "Ira Glasser, the executive director of the American Civil Liberties Union, warned that such an interpretation would create an atmosphere in which citizens' constitutional rights would be at considerable risk . . ." *Id.*

¹⁰⁵ See U. S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

¹⁰⁶ See generally *The F.B.I. Overreaches*, N. Y. TIMES (Editorial), May 10, 1995, at A22 (noting that the FBI seeks to "reinterpret" the rules "specifically revised by the Reagan Administration to give the F.B.I. greater latitude in investigating domestic terrorisms.").

¹⁰⁷ See U.S. CONST. art. I, § 9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

¹⁰⁸ See Open Letter from Nadine Strossen, ACLU President & Ira Glasser, ACLU Executive Director, to President Clinton, *ACLU To Clinton: Veto Terrorism Bill, Preserve Our Greatest Liberty* (visited Sept. 27, 1997) <<http://www.aclu.org/news/n041896b.html>> ("Alexander Hamilton described habeas corpus as the greatest liberty of all, which the Constitution, through the Suspension Clause, 'provided for in the most ample manner.'").

constitutional rights had been violated, and even if they could present exculpatory evidence that had not previously been considered in their cases.¹⁰⁹

It is shocking enough that the United States should remain isolated among the nations of the developed world in its continuing imposition and enforcement of the death penalty,¹¹⁰ but it is even more shocking that this cruel punishment could be inflicted on individuals who had been tried under unconstitutional procedures and deprived of the opportunity to present all exculpatory evidence.¹¹¹

How ironic that the United States Senate, which was founded on human

¹⁰⁹ See David Broder, *Abusive Clinton Plays Politics With Bill of Rights*, MONTGOMERY ADVERTISER, June 19, 1996, at 16A. "[C]ongressional Republicans added to the anti-terrorism bill an extraneous provision limiting death row inmates' rights to appeal state court decisions to the federal judiciary." *Id.* Moynihan "in a stinging Senate speech" called this provision "the most serious legislative abridgment in his lifetime of the writ of habeas corpus" that "would have 'confounded the framers' of the Constitution." *Id.*

¹¹⁰ See, e.g., David Cole, *Courting Capital Punishment: With Little Public Opposition, the Machinery of Death is Shifting Into Overdrive*, THE NATION, Feb. 26, 1996, at 20.

What are U.S. death-penalty opponents to do when their arguments are taken seriously thousands of miles away [in South Africa who abolished the death penalty] but ignored at home? The courts offer little hope. For the first time in more than two decades, not a single Justice on the Supreme Court maintains that the death penalty is unconstitutional. State courts overlook constitutional errors so often that federal benches have had to reverse state death sentences in more than forty percent of habeas corpus appeals. And now Congress is poised to restrict federal habeas corpus review of state court convictions, undermining even that stopgap safeguard.

Id.

In his concurring opinion in the South African death-penalty case, Justice Albic Sachs, a longtime antiapartheid advocate, reflected on the relationship between human misery and constitutional progress. He noted that "Germany after Nazism, Italy after Fascism, and Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain all abolished capital punishment for peacetime offenses after emerging from periods of severe repression. They did so mostly through constitutional provisions." *Id.* Sachs implied, "It may take the experience of such widespread abuses . . . before a polity realizes the fundamental importance of constitutionally protecting human life and dignity from state-sanctioned killing.

Id.

¹¹¹ See, e.g., Cole, *supra* note 110, at 20. "The accelerated pace of executions, together with the elimination of death-penalty resource centers and restrictions on federal court review, insures that the years to come will see many more 'mistakes' in the administration of death--perhaps enough to exceed public tolerance." *Id.* "In Justice Blackmun's last year on the Supreme Court, he reached the conclusion, after twenty years of trying to administer a fair system of capital punishment, that it is not humanly possible to do so. As a Justice, Blackmun had personally ruled on every one of the country's thousands of death-penalty convictions during that period. He witnessed what he called 'the machinery of death' firsthand." *Id.*

rights principles more than two centuries ago, should initially pass this profoundly anti-human rights law -- with only a handful of dissenting votes¹¹² -- one day after the South African Supreme Court unanimously abolished the death penalty!¹¹³

Given the very strong evidence and arguments that the death penalty does not effectively deter crime,¹¹⁴ it is a good example of the politics of symbolism.

¹¹² See Laurie Kellman, *Senate Vote Moves Anti-terrorism Bill*, WASH. TIMES, Apr. 18, 1996, at A1. "The 91-8 roll call by which the Senate approved an anti-terrorism bill that would limit federal appeals by death-row inmates and other prisoners and allow the death penalty in certain terrorism cases and in killing of a federal employee because of his job." (51 Republicans For, 1 Republican Against; 40 Democrats For, 7 Democrats Against). *Id.* Cole, *supra* note 99, at 11. "The Senate, which acted precipitately in the wake of the Oklahoma City bombing, passed an anti-terrorism bill by a vote of 91 to 8 in June." *Id.*

¹¹³ *The State v. T. Makwanyane and M. Mchunu*, Constitutional Court of the Republic of South Africa (June 6, 1995) <<http://www.law.wits.ac.za/judgements/deathsn.txt>>. For an overview of news stories commenting on this momentous decision, see generally *South Africa Abolishes Death Penalty*, JOHNSON PUBLISHING COMPANY, June 26, 1995, at 20. "The Country's 11-member Constitutional Court decided to abolish the death penalty after determining it was no more of a deterrent than life imprisonment." *Id.* The President of the court said: "Everyone, including the most abominable of human beings, has a right to life, and capital punishment is therefore unconstitutional." *Id.* *Reaction to Abolition of Death Penalty* (BBC Summary of World Broadcasts, SABC SAfm radio, Johannesburg, June 8, 1995). Both the National Party and the Democratic Party "criticize[d] decision to abolish death penalty." *Id.*; see also Cole, *supra* note 110, at 20. "South Africa [was] the forty-second country to abolish capital punishment since 1976" and the brief written and "filed in Johannesburg" was "the most eloquent death-penalty brief . . ." *Id.* The brief "argued that the United States' experience with capital punishment was itself the best argument against its constitutionality in South Africa." *Id.* In addition, South Africa's Court "drew" from the "conclusions of dissenting Justices Thurgood Marshall, William Brennan and Harry Blackmun that the death penalty is inherently arbitrary, discriminatory and unconstitutional." Cole, *supra*. But in Botswana, according to Mooketsi, a correspondent for Africa Information Afrique, "the press is divided" over abolishing the death penalty. *Id.*

¹¹⁴ See, e.g., Henry Schwarzschild, *A Social and Moral Atrocity*, 71 Apr. A.B.A. J. 38 (1985). Evidence that the death penalty deters violent crime "is essentially nil, intuition and common sense notwithstanding." *Id.* If "usefulness" is meant to "establish dramatically that the society will not tolerate behavior so unforgivably destructive as murder -- then there arises the unanswerable question of how a society can teach that killing people is wrong by itself committing spectacular premeditated violent homicide." *Id.* Moreover, "people who commit heinous crimes" usually "expect to get away with it" or "they act under pressures of the moment," thereby committing "the crime heedless of the consequences," and the "possibility of the death sentence does not restrain their actions." *Id.* Martin Garbus, *Executioners' Song: Death Penalty*, THE NATION, Dec. 19, 1994, at 748. "In recent years, the debate over the death penalty has shifted drastically. Even its advocates now agree that it has not been shown to have any deterrent effect . . ." *Id.* "The death penalty is not an effective deterrent and, in fact, creates an atmosphere that encourages and fosters violence. Studies comparing homicide rates in death penalty states with those in other states show that the death penalty does not lower the murder rate. And the number of police, prison guards, and inmates killed is higher in death, penalty states." *Id.* In addition, the United States "continue[s] to have shockingly higher rates of murder than do Western European nations, none of which practice capital punishment." *Id.* If you consider and

Indeed, some death penalty proponents say that they support it precisely because they like what it symbolizes.¹¹⁵

Even beyond capital punishment, United States crime policies in general demonstrate all the flaws of the politics of symbolism. Since 1980, under the leadership of Presidents Reagan and Bush, and with substantial support from Bill Clinton and other Democrats, we have followed a so-called "get-tough" strategy of locking up more and more people for longer and longer periods.¹¹⁶

At both the federal and state levels, there has been a tidal wave of such measures, including: harsh mandatory-minimum sentencing laws, which remove all discretion from judges and require lengthy incarceration even for first-time, non-violent offenders;¹¹⁷ the abolition or restriction of probation, parole, and other alternatives to incarceration;¹¹⁸ and "three-strikes-and-you're-out" laws, which

acknowledge that "the vast majority of murders are irrational, passionate acts perpetrated in uncontrolled rage and/or while under the influence of alcohol or drugs," a "possible threat" of the death penalty "has no effect on a person in this irrational state." *Id.*

¹¹⁵ Although a number of death penalty supporters have acknowledged the lack of evidence for its deterrent effect, they support it for other reasons. *See, e.g.,* Ernst van den Haag, *New Arguments Against Capital Punishment*, NAT'L REV., Feb. 1985, at 33. "The majority of the college-educated everywhere oppose capital punishment. The people (nearly 70 percent in the United States) usually favor it." *Id.*

¹¹⁶ *See, e.g.,* Anthony Lewis, *Abroad at Home: Political Crime*, N.Y. TIMES, Feb. 18, 1994, at A27 (arguing that "get-tough" laws such as the "three strikes, you're out" policies, "state and Federal prisons [will] house, feed and provide geriatric support services for elderly Americans, [long] past the age of violence, living on into their 80's and 90's . . . The saddest thing about the political posturing over crime is that it turns us back toward remedies proved useless: more prisons, longer fixed sentences and the like. The politicians, from President Clinton down, are determined not to let a new thought on drug policy or the causes of crime enter our failed system.").

¹¹⁷ *Id.* *See also* Penny Bender, *Lawmakers Rethink Wisdom of Mandatory Minimum Sentences*, GANNETT NEWS SERVICE (Washington), Nov. 1, 1993. "Lawmakers who once thumped podiums and called for stiff prison sentences for criminals are slowly changing their tune as a growing number of judges, families and policy experts say long-term incarceration doesn't work." *Id.* "Opponents of the fixed prison terms say the real effect has been to lock up low-level drug dealers for more years than the kingpins they worked for . . ." *Id.* "Federal judges have become increasingly unhappy and more outspoken about the sentencing requirements. Ninety-two percent of federal judges responding to a House member's recent questionnaire supported repealing mandatory minimums." *Id.*

¹¹⁸ *See generally* Ralph Jimenez, *Get-Tough Law Filling Prisons At High Cost*, BOSTON GLOBE, Feb. 6, 1994, at 1. "In 1982 New Hampshire became the first state to dramatically increase prison terms for serious crimes. Since then, the state has discovered one downside to the 'three strikes and you're out' approach to fighting crime - a virtually inexhaustible supply of batters." *Id.* "Before 1982, . . . most prisoners were paroled at 15 months" but because of the judges' option "of drastically increasing sentences for three-time losers . . . [the] length of the average prison stay grew 70 percent." *Id.* *What*

require mandatory life imprisonment for the third conviction for certain kinds of crimes, including non-violent property crimes.¹¹⁹ In one recent California case, a man was imprisoned for life when he stole a slice of pizza -- the third "strike" under California's law.¹²⁰

As a result of these policies, the United States prison population has trebled since 1980¹²¹ and is expected to continue to soar, eventually overtaking the college student population.¹²² What a sad commentary on how we are preparing our nation's youth for the future!¹²³

Criminal Justice In New York Can Learn, N.Y. TIMES, July 17, 1987, at A34. In a letter to the Editor, Jim Murphy, Director, N.Y.S. Coalition, noted that "alternative sentences geared to rehabilitation remain underfinanced, underpromoted and limited because of the policy of mandatory imprisonment." *Id.*

¹¹⁹ See generally William Booth, *Florida Wants to Be On Cutting Edge of Get-Tough Crime Remedies*, WASH. POST, Feb. 16, 1994, at A3 (stating that "Congress, the Clinton administration and lawmakers in 30 states are calling for longer, tougher sentences, including the 'three-strikes-you're out' provisions that would lock up repeat offenders for life without parole.").

¹²⁰ Tom Rhodes, *Third Strike and Pizza Thief is Out For 25 Years*, THE TIMES (London) April 4, 1996, at 1. See also Fox Butterfield, *3-Strikes Law Shakes Up California's Judicial System*, HOUSTON CHRON., April 2, 1995, at 3. "[A] 27-year-old man was sentenced to 25 years to life in prison for his third felony conviction -- for stealing a slice of pizza. Yet juries in San Francisco have refused to convict people when they learn it will make the defendants third-time felons." Butterfield, *supra*.

¹²¹ See, e.g., Lewis, *supra* note 116, at A27 (noting that "[t]he United States has more prisoners per capita than any other country: 455 per 100,000. That is 10 times the rate in Japan. There are almost one million Americans in prison today, three times the number in 1990.").

¹²² See, e.g., Reps. John Conyers & Craig A. Washington, *Senate Crime-Busters Got It Wrong*, WASH. POST. (Editorial), Nov. 23, 1993, at A21. "The United States currently locks up more people per capita than any other nation on earth. Twenty-three percent of all young black men are caught up in the criminal justice system: in prison, on probation, or on parole. There are more young black men in prison today than in college. For every Latino male with a BA, there are 24 behind bars." *Id.* Andrea Ford, *Prison Life, Parole Touch High Level of Young Blacks: Survey: the 67,556 Males in their 20s Are Imprisoned, On Parole Or Probation, A Study Reveals. Activists are Stunned by the Finding*, L. A. TIMES, Nov. 2, 1990, at A3. Five years ago this report stated that "[o]ne third of African-American men in their 20s who reside in California are behind bars, on parole or on probation" and this "figure, representing 67,556 men, exceeds by nearly five times the number of African-American men who attend four-year colleges in the state and is 10 percentage points higher than the number of young black men nationwide who are in prison or otherwise under the control of the criminal justice system." *Id.* Compare these findings with statistics of "5.4% of white male Californians in their 20s [who] are in the same situation. The figure for similar California Latino males is 9.4%." *Id.*

¹²³ See, e.g., Conyers, *supra* note 122, at A21. "Despite 19 get-tough crime bills over the past two decades . . . violent crime has increased. Yet once again, there is no money for treatment, no money for children and no money for education." *Id.* "We would provide educational and vocational

When one focuses on a particular segment of America's young people -- African-American males in their twenties -- the numbers are even more distressing. Nationwide, at any given time, fully one-quarter of these young men are in the thrall of the criminal justice system: in prison or jail, on probation or parole.¹²⁴ In certain cities, including our nation's capital, that alarming percentage is even higher.¹²⁵

opportunities for young people [in their crime bill, the Crime Prevention and Criminal Justice Reform Act]. But a real anti-crime strategy needs also to include . . . early childhood intervention programs, full funding for Head Start and the Women, Infants and Children Program" *Id.*

¹²⁴ See, e.g., Ford, *supra* note 122, at A3. "One third of African-American men in their 20s who reside in California are behind bars, on parole or on probation . . ." *Id.* "A February study by the Sentencing Project, a Washington, D.C. organization, intent on improving alternative sentencing programs, found nearly one in four blacks between the ages of 20 and 29 are under the control of the criminal justice . . ." *Id.* See also Ronald J. Ostrow, *Sentencing Study Sees Race Disparity*, L. A. TIMES, Oct. 5, 1995, at A1. "Nearly one in three African American men in their 20s is in jail, prison, on probation or parole -- a sharp increase over the approximately 25% of five years ago, a study concluded Wednesday [estimating that 827,440 black males from ages 20 to 29, or 32.2% of that population']. The Sentencing Project, an organization critical of stiffer sentencing policies and the 'war on drugs,' also found that African American women in their 20s showed the greatest jump of all demographic groups under criminal justice supervision -- up 78% from 1989 to 1994." *Id.* See also Fox Butterfield, *More Blacks In Their 20's Have Trouble With the Law*, N.Y. TIMES, Oct. 5, 1995, at A18. "Marc Mauer, the report's principal author, acknowledged using estimates to calculate that the criminal justice system now held 827,440 black men in their 20's, or 32.2 percent of all black men in that age group." *Id.* "The authors of the study attribute the increase to tougher laws on sentencing . . . the boom in prison construction . . .," and Michael Tonry, a professor of law and public policy at the University of Minnesota, said the "study 'tells us that our criminal justice policies are doing a whole lot of social damage.'" *Id.* Professor Tonry notes the "critical fact is that since the beginning of the Reagan Administration in 1980, legislators . . . adopted laws that by themselves tend to punish blacks and other poor minorities disproportionately." *Id.* Tonry discovered that "Blacks are now seven times more likely to go to prison than whites." *Id.* This report "offered evidence to support this view. Blacks make up 12 percent of the United States' population and constitute 13 percent of all monthly drug users . . . but represent 35 percent of those arrested for drug possession, 55 percent of those convicted for drug possession and 74 percent of those sentenced to prison for drug possession." *Id.* See also Debra J. Saunders, *Let Punishment Fit The Crime*, S.F. CHRONICLE, Feb. 28, 1994, at A18. "Federal drug laws mandate tougher sentences for crack cocaine than powdered cocaine. According to a U.S. Sentencing Commission study, 91 percent of federal prisoners doing time for crack in 1992 were black. For the misfortune of choosing the less penally-correct drug, users possessing one gram of crack face a mandatory one-year sentence." Saunders, *supra*.

¹²⁵ Clarence Johnson, *Racial Gap In Sentences Is Growing New Figures Show Blacks Jailed More*, S.F. CHRON., Feb. 13, 1996, at A1. "[N]early 40 percent of African American men in their 20s in California are imprisoned, on parole or on probation, a rate nearly eight times higher than for whites." *Id.* See also Keith Harriston, *Going to Jail Is 'Rite of Passage' For Many D.C. Men*, WASH. POST, Apr. 18, 1992, at B3. "On any given day in 1991, 42 percent of the black men between 18 and 35 years old in the District were incarcerated, on probation, on parole, awaiting trial or being sought on an arrest warrant, according to a report by the National Center on Institutions and Alternatives." Harriston, *supra*.

While politicians from left to right sound the same tired themes about “tough” crime measures, those who are actually involved in the criminal justice system have voiced an equally broad consensus for a very different conclusion. According to these experts, such measures are tough only on our rights; but they are not tough or effective in terms of reducing crime. Therefore, prominent police chiefs, prosecutors, prison wardens, and corrections commissioners have joined defense attorneys, criminologists, and civil libertarians in calling for less reliance on incarceration, and more reliance on crime prevention and alternative punishments.¹²⁶

One of the many experts, with long experience in the justice system, who has denounced mandatory minimum sentences is our nation’s Chief Justice, William Rehnquist.¹²⁷ One can hardly accuse him of being “soft on crime!”

In the same vein, the former Commissioner of Corrections for Minnesota recently said: “[t]here is no relationship between the incarceration rate and violent crime. We’re in the business of *tricking* people into thinking that spending hundreds of millions for new prisons will make them safer.”¹²⁸ This point -- that incarceration does not adequately counter crime -- was underscored by James Fotis, Executive Director of the Law Enforcement Alliance of America, a lobbying group for police officers: “[w]e have to get back to the reinstatement of family values and rebuild parts of our cities that have been forgotten by most of the government in the last 20 years.”¹²⁹

In short, while politicians apparently believe that it would be political suicide to talk about “root causes of crime,” those who deal directly with crime believe it is community suicide *not* to address that subject.

Two statements by prominent Democrats during a recent United States Senate debate on crime legislation well illustrate the symbolic, demagogic cast of our policies in this important area. Senator Joseph Biden noted that the Senate’s anti-crime zealotry was at such a fever pitch that, “If someone proposed barb-wiring

¹²⁶ See Bender, *supra* note 117.

¹²⁷ See *Crime: President Panders To Fear*, ARIZ. REPUBLIC (Knight-Ridder Tribune), Jan. 26, 1994, at A6. “Chief Justice William Rehnquist, speaking at a symposium on drugs and violence last year, cited objections by a majority of federal judges to mandatory minimums. ‘The best argument against any more mandatory minimums . . . is that they frustrate the careful calibration of sentences from one end of the spectrum to the other,’ he said.” *Id.*

¹²⁸ Andrew H. Malcolm, *More Cells for More Prisoners*, N.Y. TIMES, Jan. 18, 1991, at B16 (quoting Daniel P. O’Brien, Assistant to Minnesota’s Commissioner of Corrections).

¹²⁹ See Clifford Krauss, *Can Money Buy Safety?*, N.Y. TIMES, Nov. 12, 1993, at A1.

the ankles of jaywalkers, we'd pass it."¹³⁰ In the same vein, Senator George Mitchell, then-Majority Leader, said, "This perennial debate about crime has nothing to do with crime and everything to do with politics."¹³¹

The insidious politics of symbolism is also illustrated by two other types of measures that have been passed by or are pending before various government bodies, all over the country, from school boards to the United States Congress: government-sponsored prayers or moments of silence in schools, meetings of governmental agencies, and other public gatherings,¹³² and mass or random urinalysis drug testing of students, employees, job applicants, and members of other groups, when there is no evidence that any member of the group has used drugs or otherwise broken the law.¹³³

These measures, which deeply violate individual religious liberty¹³⁴ and

¹³⁰ Dan Walters, *Crime Hysteria vs. Rationality*, SACRAMENTO BEE, Nov. 18, 1993, at A3. "If anyone proposed barb-wiring the ankles of anyone who jaywalks, I think it would pass," Biden declared in obvious frustration." *Id.*

¹³¹ Kathleen Taylor, *Hardball Crime Proposals are Off Base*, SEATTLE TIMES, July 13, 1994, at B5.

¹³² House Speaker Gingrich has vowed to bring last year's amendment struggle to a head. In late 1995, two different constitutional amendments to the religion clauses of the First Amendment were introduced in the House of Representatives. Rep. Ernest Jim Istook (R-OK) introduced the Religious Liberties Amendment, H.J. Res. 127, and Rep. Henry Hyde (R-IL) introduced the Religious Equality Amendment, H.J. Res. 121. In the Senate, Orrin Hatch has introduced an amendment, S.J. Res. 45, identical to Rep. Hyde's Religious Equality Amendment. See Terry Anderson, *School-Prayer Amendment: Pray That it Won't Pass*, BUFFALO NEWS, Aug. 22, 1996, at 3B; Ronald L. Goldfarb, *The 11,000th Amendment; What's Wrong With the Rush to Revise the Constitution*, WASH. POST, Nov. 17, 1996, at C04 (arguing that the current glut of proposed amendments might move some to propose a constitutional amendment banning all constitutional amendments).

¹³³ *Privacy Right Isn't Only For The Rich; Dole Scrapes Bottom With Drug-Testing For The Poor*, BUFFALO NEWS, May 25, 1996, at 2C (noting that Dole, looking to one-up Clinton, called for drug-testing of welfare recipients); Eric Rolfe Greenberg, *Drug-testing now standard practice*, HR FOCUS, Sept. 1996, at 24 (stating that "[f]our-fifths of major U.S. companies now test employees or new hires for illegal drug use."). See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 2391 (1995). Here, the court held that a requiring a warrant would hinder the "swift and informal disciplinary procedures" that schools are perceived as needing. *Id.*

¹³⁴ As for why government-sponsored prayer or other religious exercises in public schools and other public settings violates the religious liberty protected by the Establishment Clause, see, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

privacy,¹³⁵ are not defended even by their proponents as directly counteracting crime, violence, or any other societal problem. Yet the many proponents of these measures, from across the political spectrum, do contend that they would make a symbolic contribution to reducing crime and violence.¹³⁶

Many proposals to include government-sponsored religious exercises in public schools, for instance, have been promoted precisely as alleged antidotes to the distressingly high level of school violence. For example, that was the rationale offered to support a law allowing government-sponsored prayers in the District of Columbia public schools proposed by Mayor Marion Barry, himself a convicted criminal, who says his religious commitment was heightened by his prison experience.¹³⁷

Seven years ago, Supreme Court Justice Antonin Scalia dissented from the majority's decision upholding mass urinalysis drug-testing for United States Customs Department employees when there was no evidence of a drug problem in that department.¹³⁸ He denounced these invasive tests as an "immolation of privacy and human dignity in symbolic opposition to drug use."¹³⁹

Yet this same symbolic purpose was enough to persuade Justice Scalia to join five other Justices, six years later, in upholding another "immolation of privacy and human dignity," to quote his own fine phrase. The Court upheld a school's

¹³⁵ As for why random urinalysis drug-testing violates the privacy protected by the Fourth Amendment, see, e.g., *Vernonia Sch. Dist.*, 115 S. Ct. 2386 (O'Connor, J., dissenting), see also *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (Marshall, J., dissenting); *Nat'l Treasury Employees Union*, 489 U.S. at 680 (Scalia, J., dissenting).

¹³⁶ See generally George Kaplan, *Meaningless Prayers*, WASH. POST (Editorial), July 4, 1992, at A17. "Implicit in George Will's whining about the recent Supreme Court prayer decision ['Splitting Hairs Over Prayers,' op-ed, June 28], is the notion that opposition to government-sponsored prayer is confined to atheists, secular humanists and other liberal, ACLU types. Will views such prayer as a 'community right,' the community apparently being made up of what he would regard as God-fearing folks." *Id.*

¹³⁷ See generally *Marion Barry Released from Prison*, REUTERS NORTH AMERICAN WIRE (Richland, Pa.), Apr. 23, 1992. "Former Washington Mayor Barry ended his six-month imprisonment" but when questioned "would not say whether he will seek elected office" again. *Id.* He wore a "traditional African knit cloth" scarf and hat while addressing a "crowd of 250 supporters who came from Washington by bus." *Id.* "[Barry] read a Bible passage on forgetting the past and led a silent prayer for the 1.5 million African Americans held in U. S. jails." *Id.* See also Lori Montgomery, *After Scandal, D.C. Ex-Mayor Looks For Redemption At Polls*, MIAMI HERALD, Sept. 11, 1994, at A8. "Barry believes his personal rehabilitation experience can best lead [the] city through its own recovery." *Id.*

¹³⁸ See *Nat'l Treasury Employees*, 489 U.S. 656.

¹³⁹ *Id.* at 678 (Scalia, J., dissenting).

policy of forcing all students who wanted to participate in any athletic program to submit to random urinalysis drug testing, even though there was no evidence of a drug problem in the school or its athletic programs.¹⁴⁰

What apparently tipped the balance for Scalia, who wrote the majority opinion, was that the victims were young people or, as he called them, "children."¹⁴¹ Scalia's majority opinion stressed that teenage students, in contrast with "free adults,"¹⁴² are essentially second-class citizens under the United States Constitution, with only limited constitutional rights. As Justice Sandra Day O'Connor noted in her dissent, thanks to the majority's ruling, school students now have fewer constitutional privacy rights than do convicted felons who are serving prison sentences.¹⁴³

V. THE HYPOCRITICAL HIDING BEHIND AN ALLEGED CONCERN FOR CHILDREN

This double standard in the Supreme Court's treatment of young people and adults leads to a fourth overarching theme that pervades many specific current civil liberties violations: the hypocritical hiding behind an alleged concern for children's welfare.

Politicians of all stripes regularly cite their purported concern for our nation's youth as justifying many rights-infringing measures. The many new or renewed teen curfew laws fit this description. The same is true of the multifarious passed and pending censorship measures. They specifically target media and forms of entertainment that are particularly appealing to young people, including television,¹⁴⁴ video games,¹⁴⁵ computer networks,¹⁴⁶ and rap and rock music.¹⁴⁷

¹⁴⁰ See *Vernonia School Dist.*, 115 S.Ct. 2386.

¹⁴¹ *Id.* at 2391, 2396.

¹⁴² *Id.* at 2387.

¹⁴³ *Id.* at 2404 (O'Connor, J., dissenting).

¹⁴⁴ See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 551, 110 Stat. 56, 139 (1996) (noting V-chip section, "Parental choice in television programming"); see also *Action for Children's Television v. FCC* (ACT III), 58 F.3d 654 (D.C. Cir. 1995), *cert. denied sub nom.*, *Pacifica Found. v. FCC*, 116 S. Ct. 701 (1996).

¹⁴⁵ John Burgess, *Video Game Industry Plans Rating System: Move is Response To Congressional Pressure*, WASH. POST, Dec. 8. 1993, at F1 (discussing legislation sponsored by Sen. Joseph Lieberman and Sen. Herb Kohn, which has "helped spur the often-feuding industry to come together" as stated by William White Jr., marketing vice president of industry giant Sega of America Inc.).

Bob Dole recently quipped that if Bill Clinton speaks for five minutes, he will use the word "children" fifteen times!¹⁴⁸ But both Republicans and Democrats are equally guilty of invoking the mantras of "children" and "family" to camouflage what is really the anti-child, anti-family, repressive nature of their proposals. Far from protecting children or empowering families, to the contrary, these measures simply increase the power of the government to interfere in the most intimate aspects of our lives: for example, what materials we choose to read and view in the privacy of our own homes; what materials we choose to let our children have access to; and other aspects of how we bring up our children.

All of these measures violate not only the rights of the putatively benefitted children, but also the rights of adults -- all without doing anything meaningful for children's welfare. Such restrictions deprive parents of the right to shape the upbringing of their own children¹⁴⁹ by making their own decisions as to what material their children will or will not be allowed to see. And they also deprive all adults of the right to decide what they will or will not view or listen to; all of us are relegated to seeing or hearing only the material that the government deems fit for

"Some companies, he said, want the Washington-based Software Publishers Association to take charge of the system." *Id.* White believes in "self-regulation, rather than government regulation." *Id.* "To date, 18 game software companies had signed on to the coalition," and under this "broad coalition of video game producers and rental shops" have "reached basic agreement to create a national system to rate the proliferating games for violence, sex and profanity . . ." *Id.* Interestingly, or alarmingly, "[I]n California, state attorney general Dan Lungren has called for certain games to be withdrawn from sale." *Id.*

¹⁴⁶ See *supra* notes 19-26 and accompanying text.

¹⁴⁷ See *Bennett Lashes Out at Lyrics*, ROCKY MOUNTAIN NEWS (Washington), May 31, 1996, at 58A; *Watchdogs Protest "Obscene" Lyrics*, UPI, May 30, 1996. "William Bennett . . . and C. Delores Tucker, chairwoman of the National Political Congress of Black Women, urged corporations to stop putting out offensive music and announced a radio campaign to alert parents to the problem." *Watchdogs, supra*. David Daley, *Lieberman Steps Up Campaign Against "Vicious, Violent" Music Lyrics*, STATES NEWS SERVICE, May 30, 1996.

¹⁴⁸ Kathy Lewis, *Clinton Dwells On Concerns Of Children*, DALLAS MORNING NEWS, Mar. 22, 1996, at 17A. "If [Clinton] makes a 10-minute speech, he'll mention children 17 times. I've clocked him." *Id.* See also Warren P. Strobel, *Hillary Speaks To 'Hearts' of Liberals*, WASH. TIMES, Aug. 28, 1996, at A1. "Mrs. Clinton mentioned her daughter, Chelsea, eight times and used the word 'children' two dozen times." *Id.*

¹⁴⁹ For two early twentieth-century Supreme Court opinions establishing this right, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

some children.¹⁵⁰

Often politicians and others who assert they are seeking to protect children are really aiming to restrict adults' rights, too; that is why I said that they are "hiding behind" their purported concern with children's well-being. For example, Congress' massive attack on "cyberporn," launched during the summer of 1995, was heralded by lurid images of children being unwittingly bombarded by sexual images on the computer screen. For instance, the July 3, 1995 *Time Magazine* cover story featured a horror-stricken, zombie-like child mesmerized by a computer screen. The headline blared: "CYBERPORN: EXCLUSIVE. A new study shows how pervasive and wild it really is. Can we protect our kids -- and free speech?"¹⁵¹

¹⁵⁰ See *Butler v. Michigan*, 352 U.S. 380 (1957).

¹⁵¹ See Philip Elmer-Dewitt, *On A Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of Online Erotica. And There's No easy Way To Stamp It Out*, TIME, July 3, 1995, at 38; Graeme Browning, *The Sturm und Drang Over Cyberporn*, NAT'L J., Oct. 28, 1995, at 2660. Involved in the Netport debate was Mike Godwin, general counsel of the Electronic Frontier Foundation, "a leading cyberspace advocacy group" who "published a memo on the Internet" about "a study that purported to show an explosion of X-rated images on the Internet." *Id.* The study by Martin Rimm, a "Carnegie-Mellon University graduate student" created a furor and "became national news when Time magazine made it a cover story . . ." Browning, *supra*. "Meanwhile, the Guardian Angels have joined the fray. The New York City-based volunteer crime-fighting organization recently established a home page called 'CyberAngels' on the World Wide Web, the graphics-based section of the Internet. The site is devoted to providing Net-based volunteers with the information they need to monitor such crimes as the transmission of hate messages, child pornography and pirated software on the electronic networks and to report those crimes to appropriate authorities." Browning, *supra*. *How Time Fed the Internet Porn Panic; Excerpts From Online Posts About Time Magazine's June 26, 1995 Story On Internet Pornography*, HARPER'S MAGAZINE, Sept. 1995, at 11 (containing excerpts of "conversations that took place . . . on the WELL, an on-line service based in Sausalito, California . . ." in response to Time, Newsweek, and U.S. News & World Report stories about the "cover story on 'cyberporn' by Philip Elmer-Dewitt [Time magazine], the magazine's principal reporter on on-line issues."). See also Mike Godwin, *The Marty Method*, MACWORLD, Dec., 1995, at 324. "Time shouted 'Cyberporn' from every newsstand in the country. Yet three weeks later we learned that the Time, July 3 cover story should have billed 'cyberfraud.' We now know that the so-called Carnegie-Mellon study, which claimed that computer porn marketers were cultivating a public taste for extreme and degrading imagery, was largely cooked up on the mind of Marty Rimm, a 30-year-old undergraduate with questionable research skills. In fact, the now-notorious article in the June 1995 Georgetown Law Journal is so outrageously flawed that anyone with even a smattering of statistics knowledge can spot flaws on the first reading." *Id.* See also Stephen Marcus, *Truth and Consequences; Schools Seek Internet-Use Policies That Protect Kids, But Allow Access To Online Resources*, ELECTRONIC LEARNING, May, 1996, at 42. "Fueled by last summer's widely quoted, widely condemned Time magazine story on cyberporn and the decency provisions in the recently passed Telecommunications Act, anxiety is running high among educators about student safety on the Internet. Some schools are simply not allowing any Internet activity. Others require students and parents to sign contracts in an effort to limit liability. Still others, see the issue as going beyond inappropriate materials to include students' online treatment of others and use of expert discussion groups, as well as intellectual property rights." *Id.*

Yet experts note how inaccessible sexual and other controversial material is on computer networks. In contrast with television images, which flood the screen at the touch of a button, it takes much more individual initiative and choice to seek out and obtain particular on-line materials.¹⁵² Moreover, many sexual and other controversial materials can only be obtained by going through such steps as submitting a driver's license, credit cards, and access codes, all designed to make them available to consenting adults only.¹⁵³ Additionally, increasingly sophisticated blocking or filtering devices are being developed so that parents can specifically screen out certain sexual and other materials to which they do not want their children to have access.¹⁵⁴

In light of these facts, the alleged desire to shield children from certain material falls flat as a rationale for curbing content in cyberspace; what is really at stake is the desire to deprive adults of access to that material too. When I debated Christian Coalition Executive Director Ralph Reed on this issue on CNN's "Crossfire," he essentially admitted as much.¹⁵⁵

The tendency to use a purported protection of children as a smokescreen for directly curbing adults' rights is accompanied by blatant hypocrisy as far as children themselves are concerned. While politicians are eager to cite their devotion to children as an excuse for limiting the civil liberties of young and old alike, they are far less eager to adopt constructive measures that will actually advance young people's current well-being or future prospects.

Our recent budget-slashing frenzy in the United States has been particularly

¹⁵² *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 846 (E.D. Pa. 1996). "Credit card verification would significantly delay the retrieval of information on the Internet. Dr. Olsen, the expert testifying for the Government, agreed that even 'a minute is [an] absolutely unreasonable [delay] . . . [P]eople will not put up with a minute.' Plaintiffs' expert Donna Hoffman similarly testified that excessive delay disrupts the 'flow' on the Internet and stifles both 'hedonistic' and 'goal-directed' browsing." *Id.*

¹⁵³ Jim Exon, *Protecting Children From Porn*, WASH. POST, July 15, 1996, at A19. "[A] number of Internet sites already block child access by requiring credit card or adult PIN numbers like those used for automatic teller machines to access certain sites." *Id.*

¹⁵⁴ *American Civil Liberties Union v. Reno*, 929 F. Supp. at 830. "Testimony adduced at the hearing suggests that market forces exist to limit the availability of material on-line that parents consider inappropriate [for their children]." *Id.*

¹⁵⁵ See Cable News Network: Crossfire (CNN television broadcast, July 3, 1995) (transcript #1397); John Corry, *Salty V-Chips*, AM. SPECTATOR, Sept. 1995, available in LEXIS, NEWS Library, ARCNEWS File.

devastating to education.¹⁵⁶ As I previously noted, we are channeling more and more of our young people into prisons rather than colleges, and state and local governments are spending increasing amounts of their money on building more and larger jails and prisons, while public schools are crumbling.¹⁵⁷

Also prominent on the budgetary chopping-block have been all programs to benefit poor women and their children, including those that advance health and nutrition.¹⁵⁸

A 1995 study revealed that poor children in the United States are poorer

¹⁵⁶ See Bruce Alpert, *Public Schools Across Nation Are Crumbling: Louisiana Gets Poor Grade in Building Repair Needs*, TIMES-PICAYUNE (Washington), June 26, 1996, at A7. "[T]he director of the Council of Great City Schools, said Congress should restore and add to the \$100 million that used to be available from the federal government for repair and renovations of public schools. Congress eliminated the money in 1995 to help balance the budget." *Id.* See also Carl Rowan, *Politicians Our Kids' Worst Enemy*, CHI. SUN-TIMES, Dec. 27, 1995, at 29; Maribeth Vander Weele, *Schools Still In Ruins*, CHI. SUN-TIMES, Mar. 13, 1995, at 1. "Four years after a Chicago Sun-Times series documented devastating disrepair in Chicago public schools, students are still studying in crumbling classrooms." Weele, *supra*.

¹⁵⁷ Richard Lee Colvin, *Both Parties Plan School Bond Ballot Proposals; Legislature: GOP Wants to Include Provision for Prison Construction Funds, Which May Thwart Bipartisan Support Needed for Either Measure's Passage*, L. A. TIMES, Dec. 24, 1995, at A3. "'The Republican approach is still to hold the schools hostage to building prisons,' said Los Angeles Assemblyman Richard Katz, who heads the Democratic caucus. . . . The Democratic view is we need to build public schools to reduce class size . . . and after we deal with schools then we'll deal with prisons.'" *Id.* See also Jon Matthews, *Ghosts of '95 Await Legislators as '96 Session Begins*, SACRAMENTO BEE, Jan. 2, 1996, at A1. "In a standoff between [California] Assembly Republicans and Democrats, lawmakers failed in the closing hours of their 1995 work year to approve a \$3 billion school bond" leaving California with "rundown schools" and "overcrowded classrooms" as a result of "seemingly endless political infighting." *Id.* See also *Schools on Reservations Crumbling For Lack of Repair Money*, N.Y. TIMES, Sept. 3, 1995, at 17. "America's tribal schools are crumbling because of budget cuts . . . and an advisory committee to the Office of Indian Education Programs concluded in 1991 that 'schools are grossly underfunded.'" *Id.* South Dakota public schools "spent an average of \$4,045 a student for 1994-95." *Id.* However, the Bureau of Indian Affairs only spent an "average of \$2,515 for the 1994-95 year." *Id.* Although "treaties with the Sioux and other tribes" promise to "educate American Indian children . . . Congress is not giving the bureau enough money for schools." *Id.* In addition, "the Senate passed a budget that cut \$31 million for the [bureau's] schools, including \$10 million for school repair and \$13.6 million for new construction." *Id.*

¹⁵⁸ See Robert Pear, *Republicans in Congress OK Comprehensive Welfare Bill; Plan Would End Guarantee of Cash Aid For Poor Children, Let States End Food Stamps, Lunch Programs*, AUSTIN AM.-STATESMAN, Nov. 15, 1995, at A2. The welfare bill will allow "states to deny cash assistance to children born to poor unmarried women under age 18, many of whom are now entitled to welfare benefits." *Id.* The bill would also, "as a matter of national policy, [state] that federal money could not be used to increase benefits for mothers who had additional children while they were receiving cash welfare assistance." *Id.*

than the children in most other Western industrialized nations.¹⁵⁹ In the United States, proportionately more children live in poverty than in other affluent countries.¹⁶⁰ Moreover, poor children in America get the least government assistance.¹⁶¹ And this study predated the new welfare "reform" law. Thanks to that law, America's poor children will now be falling even further behind.

Particularly blatant examples of the hypocritical hiding behind an asserted concern with children's well-being to sabotage rights of children and adults, without in fact advancing children's well-being, recently have been provided by two prominent government officials, one Republican and one Democrat.

In June of 1995, Bob Dole gave the first of several well-publicized speeches assailing violence in the media and its asserted negative impact on our nation's youth.¹⁶² Yet, while Dole was thus leading the charge to ban images of guns from television, he was at the same time leading the charge to repeal the ban on actual assault weapons on the street!¹⁶³

¹⁵⁹ See Keith Bradsher, *Low Ranking for Poor American Children*, N.Y. TIMES, Aug. 14, 1995, at A9 (noting that only in Israel and Ireland are poor children worse off than poor American youths and that the United States appears to have sunk through the rankings over the last 30 years).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See also *Poverty's Children: Why So Many Grow Up Needy in California*, SAN DIEGO UNION-TRIB., May 18, 1995, at B-10. "California is America's richest state, yet its children are among the nation's poorest" because of "high jobless rate, a dearth of affordable child care and a poor collection rate for child-support payments." *Id.*

¹⁶² See generally, Martin Kasindorf, *East Target: Dole's Hollywood Hit A No-lose Deal*, NEWSDAY, June 2, 1995, at A07. While Dole recently "singled out Time Warner Inc. for criticism over rap music lyrics . . . federal election records show that Dole has accepted at least \$21,000 from Time Warner's political-action committee since 1987, according to The Associated Press." *Id.* See also Tony Mauro & Andrea Stone, *Violence in the Media: Picture Unlikely To Change*, USA TODAY, June 6, 1995, at 4A. "Sen. Bob Dole's attack on Hollywood violence and sex comes at a time when research is increasingly showing a connection -- if still just a small one -- between media violence and the real thing. But mainly because of the First Amendment's protection of free expression, drawing a connection between the media and acts of violence has not led to regulating the media -- and won't likely soon." *Id.* "The research says you learn what you are looking at," says Peggy Charren, founder of Action for Children's Television." *Id.*

¹⁶³ See generally *Dole Takes On The Movies; His Motivation May Be Political, But The Kansas Senator and Presidential Candidate Is Right To Join The Chorus Asking For More Social Responsibility From The Entertainment Industry*, FRESNO BEE, June 4, 1995, at B6 (stating that Dole "turned his back on sensible gun control to court the GOP right wing."). See also Roger Simon, *Dole Is Angry Over Fiction, Not the Reality of Violence*, SUN (Baltimore), June 4, 1995, at 2A. "Bob Dole attacks Hollywood for its violent films . . . that are 'bombarding our children with destructive messages of causal violence . . . attacks Time Warner for producing songs by rappers . . . [but he] opposes the current ban on assault weapons . . . [and he] has promised to repeal that ban." Simon, *supra*.

Similarly, as spotlighted in the 1995 hearings on the issue, Attorney General Janet Reno ordered the disastrous raid on the Waco compound in 1993, in which twenty-five children (and fifty adults) died, allegedly because she wanted to protect those very children.¹⁶⁴ But, according to the expert that the Justice Department itself retained to investigate this situation, the tear gas that the federal law enforcement officials used was predictably fatal to the children who were in that enclosed space, due to their small lung capacity.¹⁶⁵ This nightmarish scenario of killing the children to save the children -- and, in the process, violating fundamental rights of adults and children alike -- is, alas, a metaphor for much American policy.

VI. ATTACKS ON THE INDEPENDENCE OF THE JUDICIARY

The final overarching theme that ties together the myriad current assaults on civil liberties is the attack on the independence of the judiciary. This theme is closely related to a couple of the others -- in particular, the politics of scapegoating and the politics of symbolism.

Indeed, the political motivation for attacking civil liberties is precisely what the independent judiciary is intended to counter, under our constitutional design. By providing life-time tenure for federal judges, subject to removal only through the

¹⁶⁴ See *Haunted by Use of Tear Gas, Reno Says; Second Guessing: Despite Wrestling With Her Conscience, The Attorney General Insists She Made The Right Decision During Waco Standoff*, ATLANTA J. AND CONST., July 28, 1995, at 4A. "The attorney general made extensive inquiry into virtually every detail of the FBI's plan, including the effects of tear gas on children and pregnant women," said former FBI Assistant Director Larry Potts" at congressional hearings. *Id.* "Toxicologist Harry Salem, a civilian expert who works for the Army, said he advised Reno that CS gas was the safest chemical agent that could be used on the compound and that it would cause no permanent harm to children." *Id.*

¹⁶⁵ See Jerry Seper, *Reno Faces Questions On Waco Gas Attack; Banned Chemical's Use Probed On Hill*, WASH. TIMES, June 5, 1995, at A1. The Washington Times ran a piece on the Waco raid "three days after the event . . . [stating] that the FBI used CS [a 'gas banned for military use at the Chemical Weapons Convention in Paris in January 1993']" and the report noted "that its impact on the children trapped inside would have been disastrous." *Id.* "Dr. Alan A. Stone, a Harvard University professor of psychiatry and law hired by the Justice Department to review the Waco raid, said a departmental investigation did not reveal 'what evidence Janet was given to change her mind about the dangers of CS gas for infants who do not have the lung capacity necessary to breath through a gas mask.'" *Id.* Dr. Stone did a "computer search on CS" which "showed the children risked 'fulminating chemical pneumonia and death.'" *Id.* "One top FBI official said the plan was implemented after doctors said that while the children would be in some difficulty, they would not die from CS exposure." *Id.*

extraordinary process of impeachment,¹⁶⁶ our Constitution intended to shield judges from the political pressures that so directly influence elected officials. The federal courts were deliberately designed as a counter-majoritarian branch of government, well-situated to enforce the counter-majoritarian Bill of Rights and other individual freedoms¹⁶⁷ against what James Madison called "the tyranny of the majority."¹⁶⁸

This special function of the federal courts and the Bill of Rights was most eloquently and memorably described by the Supreme Court in *West Virginia Board of Education v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁶⁹

Given this special role of the federal courts as the ultimate guarantors of individual and minority group rights, it is especially disturbing that the current assault on such rights by our elected officials has also undermined judicial independence. Not only are our elected officials directly cutting back on individual rights; worse yet, they are also cutting back on the courts' ability to protect such rights.

Yet this insidious aspect of the current onslaught has received insufficient

¹⁶⁶ See U. S. CONST. art. III, §1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Id.

¹⁶⁷ See Nadine Strossen, *The Supreme Court's Role: Guarantor of Individual and Minority Group Rights*, 26 U. RICH. L. REV. 467 (1992).

¹⁶⁸ See FEDERALIST NO. 51 (James Madison); see also Clarence Page, *Bork Shows His Grouchy Side, Again*, CHI. TRIB., Oct. 6, 1996, at 23 (arguing that "[a]fter the framers of the Constitution put majority rule into place, they went back and shored up minority rights in the Bill of Rights precisely to guard against what James Madison called 'the tyranny of the majority.'").

¹⁶⁹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

attention. These measures have been slipped into larger bills, often with no floor debate; their passage has gone largely unnoticed by the public, the press, and even some lawmakers. Accordingly, to draw attention to this important but under-reported phenomenon, the ACLU issued a report in June, entitled *Court Stripping: Congress's Campaign to Undermine the Power of the Judiciary*.¹⁷⁰ This report shows how a series of legislative actions this past spring are undermining fundamental constitutional rights by eroding the independence, scope, and power of the federal court system.

These measures are: the Prison Reform Litigation Act,¹⁷¹ which strips the federal courts of much of their power to correct even the most egregious prison conditions; the restrictions on the Legal Services Corporation (LSC), which prohibit LSC from bringing sweeping categories of cases, even with non-government funds, thus effectively preventing federal courts from remedying violations of the rights of poor Americans;¹⁷² the Antiterrorism and Effective Death Penalty Act,¹⁷³ which cripples federal habeas corpus, as I have already explained; moreover, this Act, as well as separate immigration legislation, both contain court-stripping provisions that deny the due process rights of all immigrants, including long-term permanent

¹⁷⁰ *Court Stripping: Congress Undermines the Power of the Judiciary*, ACLU SPECIAL REPORT, June 1996, available in ACLU Website, <<http://www.aclu.org/library/ctstrip.html>>.

¹⁷¹ See generally Jenni Gainsborough, *Prison Litigation Reform Act -- A Threat To The Rights of States And Individuals*, 1 CORRECTIONS PROFESSIONAL 19, June 24, 1996.

¹⁷² H. R. 2277, 104th Cong., 1st Sess. (1995), as amended Sep. 21, 1995 (a bill to abolish the Legal Services Corporation and provide the States with money to fund qualified legal services). Burt Neuborne brought a lawsuit on behalf of the Brennan Center at New York University Law School challenging these cutbacks on constitutional grounds. See Burt Neuborne, *Pushing Free Speech Too Far*, N.Y. TIMES, July 15, 1996, at A13. See also, Nina Bernstein, *Suit Challenges Accord That Bars Legal Services Class-Action Cases for Poor*, N.Y. TIMES, Aug. 1, 1996, at D22. "As a Congressionally imposed deadline takes effect today for legal services lawyers to withdraw from class-action lawsuits, a prominent civil liberties lawyer is challenging the constitutionality of the measure. Mr. Neuborne 'contends that the restrictions violate the separation of powers and equal protection and trample the constitutional rights of lawyers, indigent clients, judges and private contributors who want to support the legal services cases banned by Congress.'" Bernstein, *supra*.

¹⁷³ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified at 28 U.S.C. § 2263 (1996)). See generally Susan N. Herman, *Clinton Takes Liberties With The Constitution*, NEWSDAY, Aug. 4, 1996, at A46. "After our earlier brush with terrorism in Oklahoma City, Congress enacted an anti-terrorism bill proposed by President Clinton that contained a number of provisions shocking to civil libertarians. Suspected terrorists could be deported without ever being told what evidence the government had that they were terrorists; the government could deport people who belonged to organizations labeled terrorist organizations, even if the organization also had many legitimate activities." Herman, *supra*.

residents, regardless of the strength of their legal claims.¹⁷⁴

These four laws add up to a concerted campaign to inject politicians into the judicial arena and prevent the courts from doing their job. There has not been such a wholesale attempt at court stripping since Congress, in an effort to curtail the civil rights movement, tried to stop the federal courts from ordering busing for desegregation.¹⁷⁵

The federal courts have long been a target of politicians of every stripe. However, we have recently seen a series of unusually harsh attacks, which set the stage for Congress' unprecedented current power grab against the courts. During the early phases of the current campaign season, the federal judiciary emerged as a scapegoat for crime and a range of other social ills.

In February, then-candidate Pat Buchanan called federal judges "little dictators in black robes," and called for an end to their life tenure.¹⁷⁶ The fire was fueled when Judge Harold Baer, a federal district judge in New York, threw out evidence that he decided had been illegally seized in a highly publicized drug case.¹⁷⁷ Amid a chorus of demands for Judge Baer's resignation or impeachment,¹⁷⁸

¹⁷⁴ Patrick J. McDonnell, *New Law Could End Immigrants' Amnesty Hopes*, L.A. TIMES, Oct. 9, 1996, at 1.

¹⁷⁵ One writer goes even further, Robert Marquand, *Justified or Pernicious Limits? New Judicial Curbs Draw Fire*, CHRISTIAN SCIENCE MONITOR, Nov. 15, 1996, at 1 (arguing that Congress has quietly passed a broad series of laws that restrict federal judges in ways not seen since the Civil War era).

¹⁷⁶ See generally Karen Lowe, *Buchanan Targets Judges For Subverting Immigration Restraints*, AGENCE FRANCE PRESSE, Mar. 20, 1996. "Republican presidential hopeful Pat Buchanan targeted judges here Tuesday as 'dictators in black robes' for gutting an anti-immigration measure overwhelmingly passed by Californians." *Id.*

¹⁷⁷ See generally *Baer's Reversal: After Outcry, N.Y. Judge Fixes His Mistake*, COLUMBUS DISPATCH, Apr. 14, 1996, at 2C; *Judge Reverses Controversial Drug Ruling*, FACTS ON FILE WORLD NEWS DIG., Apr. 11, 1996, at E3. Judge Baer "had ruled that impounded drugs could not be used to prosecute an alleged drug courier because police did not have 'probable cause' to search her vehicle. Baer's initial ruling, which critics perceived as soft on crime, had come under fire from members of congress and from the White House." *Id.* See also *A Good Outcome From A Bad Law*, N. Y. TIMES, Aug. 4, 1996, at 14. "Judge Baer ruled under the Prison Reform Litigation Act, which Congress passed earlier this year because it wanted to stop the Federal courts from siding with inmates in prison cases." *Id.* "Like many get-tough measure, this law ignored important issues of individual constitutional rights, and it sought to reduce the legitimate role of the courts." *Id.* Judge Baer "in interpreting 'immediate termination' of prison consent decrees . . . went overboard" in thinking that "he had to suspend the consent decrees instantly," which created a furor. *Id.* Judge Baer did "lift the detailed court-ordered decrees that long governed living conditions in New York City's jails." *Id.* "But the legal basis of Judge Baer's decision is troubling, and it sets a precedent that would weaken the judiciary's power under the constitution to provide effective remedies in prison cases." *Id.* What is troubling is that

Bob Dole charged that one of "the root causes of the crime explosion" was "liberal" judges appointed by President Clinton.¹⁷⁹ During the Christian Coalition's annual conference in September, 1996, Ralph Reed denounced "ACLU/Clinton" judges.¹⁸⁰ Dole also attacked the American Bar Association's (ABA) role in evaluating judicial nominees, calling the ABA "nothing more than another blatantly partisan liberal advocacy group."¹⁸¹ The Clinton Administration responded with its own list of Reagan and Bush appointees who have made decisions that it said could be deemed "pro-defendant."¹⁸²

Judge Baer "chose to bow to Congress's will, in sharp contrast to two judges in Michigan and one in California who recently struck down portions of the law on Constitutional grounds." *Id.*

¹⁷⁸ See generally *Life Tenure For A Reason*, WASH. POST, Mar. 26, 1996, at A12. After the "ruling in New York last month, the White House let it be known that it was considering asking for the resignation" of Judge Baer, a Clinton appointee. *Id.* See also John J. Goldman, *Judge Bows To Pressure, Changes Ruling On Drug Seizure; Law: Federal Jurist Holds Second Hearing After Clinton and Dole Castigate Him. White House Spokesman Had Threatened To Demand Resignation*, L. A. TIMES, Apr. 2, 1996, at A8; Nina Totenberg, *Rehnquist Says No To Impeachment For Unpopular Rulings*, NATIONAL PUBLIC RADIO, Apr. 13, 1996. "Rehnquist said that the independence of the judicial branch of government could be threatened if politicians demand the impeachment of federal judges who issue unpopular decisions." Totenberg, *supra*.

¹⁷⁹ See generally Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at 1. "Dole said re-electing Mr. Clinton, who has already appointed nearly 25 percent of all sitting Federal judges, 'could lock in liberal judicial activism for the next generation, and the social landscape could dramatically change.'" *Id.*

¹⁸⁰ See *Remarks By Ralph Reed To The Christian Coalition Annual Road To Victory Conference The Washington Hilton*, FED. NEWS SERVICE, Sept. 13, 1996. Reed, addressing the Coalition said, "[W]e are never going to allow any more ACLU/Clinton -- style judges on the Supreme Court or any other federal court." *Id.*

¹⁸¹ See Jill Zuckman, *Dole Hits Clinton Over 'Liberal' Judges*, BOSTON GLOBE, Apr. 20, 1996, at 3. "Sen. Dole . . . attacked President's Clinton's judicial appointees as too liberal and hostile to law enforcement, and promised that as president he would choose judges who would adhere to the letter of the law," and would go so far as to "remove the American Bar Association from its role in reviewing potential judicial appointees. 'The ABA has become nothing more than another blatantly partisan liberal advocacy group.'" *Id.* See also Lynn Sweet, *Dole Says He'll End ABA Judge Screening*, CHI. SUN-TIMES, Apr. 20, 1996, at 4; M.A. Stapleton, *ABA Decries Political Criticism of Judiciary*, CHI. DAILY L. BULL., Apr. 22, 1996, at 1. "The independence of the federal judiciary should not be called into question as part of election year politics, the American Bar Association said Saturday in response to an attack by Sen Bob Dole." Stapleton, *supra*,

¹⁸² See generally Tony Mauro, *Are Clinton Judges Too Liberal? Dole May Be Out Of Order Experts Warn That Ranking Jurists Is Risky*, USA TODAY, May 7, 1996, at 1A. In criticizing Clinton for his Judicial selection, Dole should look at the judicial appointments of Reagan -- Justice Sandra Day O'Connor, "a Reagan appointee who can be called a lot of things but not liberal. She wrote the

All this created a climate in which justice became politicized and judges intimidated. And, as the ACLU's special report demonstrates, it enabled Members of Congress with an anti-civil liberties agenda to push through a series of restrictions that will have long-lasting adverse consequences for the independence and integrity of our federal courts.

VII. CONCLUSION

In summary, the recent across-the-board assault on civil liberties in the United States, coming from across the political spectrum, is designed as a quick-fix solution to vexing societal problems such as crime and economic insecurity and the public's understandable fears and frustrations about such problems.

But these symbolic, scapegoating, diversionary measures, while not fixing anything, rather, do irreparable damage to the Bill of Rights, the "original Contract with America." As H.L. Mencken quipped, "For every complex problem, there is a solution which is simple, elegant . . . and wrong."¹⁸³

opinion for a unanimous nine-justice court, seven of whose members were appointed by Republican presidents." *Id.* Clinton "insists -- and academics agree -- that President Clinton, more than presidents such as Reagan and Franklin Roosevelt, has actually passed up the chance to appoint ideologues." *Id.* In fact, a study done by "political science professor, Robert Carp of the University of Houston and his colleagues have cataloged and tagged by political leaning 36,500 judicial decisions since the Nixon administration, including 400 by Clinton judges. Carp says that numbers show that Clinton's nominees are middle of the road." *Id.* See also Deborah Pines, *Clinton, Judges Impact Local Bench*, N.Y. L. J., Oct. 2, 1996, at 1. Clinton "has appointed slightly more federal judges than his predecessor, George Bush" appointing "22 judges to the trial and appellate courts based in Manhattan and Brooklyn. That nearly matches the 24 judges President Regan appointed to those courts in eight years and is nearly double the 12 appointments made by Bush." *Id.* Katharine Q. Seelye, *supra* note 179, at 1. Dole attacked Clinton's judicial nominees as "an all-star team of liberal leniency," but Clinton's Administration "immediately threw cold water on Mr. Dole's charges, saying that the President's appointees were hardly more liberal than those appointed by President Bush." *Id.*

¹⁸³ Mark A. Hall & John D. Columbo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 330 n.76 (1991) (quoting H.L. Mencken); see also *United States v. McCoy*, 32 M.J. 906, 909 (1991) (quoting Mencken, "For every complex problem there is a simple solution . . . and it is usually wrong."); *States v. Michael*, 645 F.2d 252, 264 n.6 (5th Cir. 1981), *cert. denied*, 454 U.S. 950 (1981) (quoting Mencken, "For every complex problem there is usually a simple answer -- and it's wrong."); *Bing v. Florida*, 492 So.2d 833, 835 n.9 (Fla. Dist. Ct. App. 1986) (quoting Mencken, "For every complex problem there is a solution that is short, simple and wrong.").

